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7. 1. 19. 19. 19.

No. 12187

United States
Court of Appeals

for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY, a corporation, and JOSEPH HENRY HARRISON
and JANE DOE HARRISON, his wife,

Appellants,

vs.

EVELYN M. DeBUSE, Administratrix of the Estate of Charles De-
Buse, deceased, EVELYN M. DeBUSE, as Guardian ad Litem
for George D. DeBuse, a minor, and GERALD A. DUNN and
GLADYS E. DUNN, his wife,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

APR 4 - 1949

PAUL P. O'BRYEN,

CLERK

United States
Court of Appeals
for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY, a corporation, and JOSEPH HENRY HARRISON
and JANE DOE HARRISON, his wife,

Appellants,

vs.

EVELYN M. DeBUSE, Administratrix of the Estate of Charles De-
Buse, deceased, EVELYN M. DeBUSE, as Guardian ad Litem
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Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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Seattle 1, Washington,
Attorneys for Appellants.

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Attorneys for Appellants.

JOE PEARSON
of Messrs. Kahin, Carmody & Pearson,
835 Central Building,
Seattle 4, Washington,
Attorneys for Appellees.

HARRY B. JONES, Jr.,
of Messrs. Jones & Bronson,
610 Colman Building,
Seattle 4, Washington,
Attorneys for Appellees.

United States District Court for the Western
District of Washington, Northern Division

Civil No. 2112

EVELYN M. DeBUSE, Administratrix of the
Estate of Charles DeBuse, deceased; EVELYN
M. DeBUSE, as guardian ad litem for GEORGE
D. DeBUSE, a minor; and GERALD A. DUNN
and GLADYS E. DUNN, his wife,

Plaintiffs,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a corpora-
tion and JOSEPH HENRY HARRISON and
JANE DOE HARRISON, his wife,

Defendants.

PETITION FOR REMOVAL

To the Honorable Judges of the Above Entitled
Court:

Petition of the defendants above named for re-
moval of the above entitled action from the Superior
Court of the State of Washington for the County
of King to the above entitled court shows:

I.

That civil action was commenced in the Superior
Court of the State of Washington for the County
of King entitled: Evelyn M. DeBuse, Administra-
trix of the Estate of Charles DeBuse, deceased;
Evelyn M. DeBuse, as guardian ad litem for George
D. DeBuse, a minor; and Gerald A. Dunn and
Gladys E. Dunn, his wife, Plaintiffs, vs. Chicago,

Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Joseph Henry Harrison and Jane Doe Harrison, his wife, Defendants, being No. 399916 of the files of the Clerk of said court, by the filing of complaint in the office of said Clerk on the 20th day of September, 1948.

That attached hereto and incorporated herein as Exhibit A is a copy of said complaint, summons, motion for appointment of guardian ad litem and order for appointment of guardian ad litem, the same being all of the papers heretofore so filed in said action.

That said action is pending wholly undetermined in said court within the district and division of the above entitled court without service of process upon or appearance by said defendants, or any of them.

II.

That in said action arising from a collision between certain vessels on Puget Sound in the State of Washington alleged to have been caused by the negligence of the defendants, the plaintiffs seek to recover for death, personal injury, and property injury aggregate damages in the sum of \$106,400.00 (exclusive of interest and costs) liability for all of which is denied by the defendants.

III.

That said action, involving an alleged maritime tort on the navigable waters of the United States, is an action over which the above entitled court has original jurisdiction because it arises under the construction and laws of the United States and within the admiralty and maritime jurisdiction thereof.

IV.

That the defendants have caused removal bond in the reasonable sum of \$500 to be executed by good and sufficient corporate surety, conditioned that the defendants will pay all costs and disbursements incurred by reason of removal, should it be determined that the case was not removable or was improperly removed.

Wherefore, the defendants pray that, upon the filing of satisfactory proof of removal having been duly perfected, the above entitled court will exercise its jurisdiction in said action for all further proceedings as required by law.

THOMAS H. MAGUIRE

BYRON E. LUTTERMAN

MERRITT, SUMMERS & BUCEY

/s/ LANE SUMMERS,

Attorneys for Defendants

(Duly Verified.)

EXHIBIT A

In the Superior Court of the State of Washington
for King County

No. 399916

EVELYN M. DeBUSE, Administratrix of the
Estate of Charles DeBuse, deceased; EVELYN
M. DeBUSE, as guardian ad litem for GEORGE
D. DuBUSE, a minor; and GERALD A. DUNN,
and GLADYS E. DUNN, his wife,

Plaintiffs,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a corpora-
tion, and JOSEPH HENRY HARRISON and
JANE DOE HARRISON, his wife,

Defendants.

SUMMONS

The State of Washington, To said Chicago, Mil-
waukee, St. Paul and Pacific Railroad Company, a
corporation and Joseph Henry Harrison and Jane
Doe Harrison, his wife, Defendant. You and each
of you are hereby summoned to appear in the Su-
perior Court of the State of Washington, for King
County, within twenty (20) days after service of
this summons upon you if served within the State
of Washington, and sixty (60) days if served out-
side the State of Washington, exclusive of the day
of service, and defend the above-entitled action.
And you are further required within said time to
answer the plaintiff's complaint, and serve a copy

Exhibit A—(Continued)

of your answer on the undersigned attorneys for plaintiffs, at their office in King County, Washington; said King County being the place designated by the plaintiffs as the place of trial of said action. You are further notified that in case of your failure so to do, judgment will be rendered against you according to the demands of the complaint, which will be filed with the clerk of said court, a copy of which is herewith served upon you.

KAHIN, CARMODY & PEARSON
Attorneys for Plaintiffs

P. O. Address 835 Central Building, County of King, Seattle, Washington.

[Title of Superior Court and Cause No. 399916.]

COMPLAINT

For the first cause of action herein the plaintiff, Evelyn M. DeBuse, as administratrix for the benefit of herself as the wife of the deceased, Charles DeBuse, and George D. DeBuse and Roberta DeBuse, minor children of the deceased, alleges:

I.

Plaintiff Evelyn M. DeBuse is the duly qualified and acting administratrix of the estate of Charles DeBuse, deceased, having been appointed in Probate Cause No. 108317 in the Superior Court of the State of Washington for King County, and as such brings this action on her own behalf as the widow of said deceased, Charles DeBuse, and on

Exhibit A—(Continued)

behalf of George D. DeBuse, aged fourteen years, and Roberta DeBuse, aged twelve years, the surviving children of said deceased.

II.

Plaintiff, Evelyn M. DeBuse, was on the 20th day of Sept. 1948, duly and properly appointed as guardian ad litem of the said minor, George D. DeBuse for the purpose of representing the said minor in this action pertaining to personal injuries received by him.

III.

That Gerald A. Dunn and Gladys E. Dunn are now, and were at all times hereinafter mentioned, husband and wife, and as such constitute a marital community under the laws of the State of Washington.

IV.

The defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, maintaining an office and transacting business within King County, State of Washington, as a common carrier and as such operates vessels and barges in the waters of Puget Sound and between cities located on Puget Sound.

V.

The defendants Joseph Henry Harrison and Jane Doe Harrison, his wife, are now and were at all times herein mentioned husband and wife and as such constitute a marital community under the

Exhibit A—(Continued)

laws of the State of Washington. The defendant Joseph Henry Harrison at all times herein mentioned was acting for and on behalf of the said community and the said corporation and within the course and scope of his authority as agent and servant of said corporation and as second mate on the steam tug Milwaukee, being a vessel owned and operated by the said corporation and drawing a barge at the time and place hereinafter mentioned.

VI.

On July 25, 1948, the deceased, Charles DeBuse, was the owner and operator of a certain cabin cruiser, Registry No. 300449 and that at about 4:00 o'clock a. m. on said date was aboard said cruiser on the waters of Puget Sound and in the vicinity of Point No. Point within Kitsap County. At about said time and place the defendant, Joseph Henry Harrison, was operating a tug and towing a barge, both of said vessels being owned by the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The said Joseph Henry Harrison was the agent and employee of the said corporate defendant and acting within the course and scope of his authority as second mate of the said tug and was at all times herein mentioned in charge of the same. At the time and place hereinabove stated, the said tug was towing the aforesaid barge in a generally westerly direction on the waters of Puget Sound, and the said defendant, Joseph Henry Harrison, acting as aforesaid, negligently caused

Exhibit A—(Continued)

the said barge to collide with and sink the aforesaid cruiser owned by the deceased, Charles DeBuse, said negligence proximately causing the death of the said Charles DeBuse, and causing the damage hereinafter set forth to the said cruiser. The negligence of said Joseph Henry Harrison, acting as aforesaid, which proximately caused the death of the deceased, damage to the cruiser which was anchored, injuries to the plaintiffs George D. DeBuse, a minor and Gerald A. Dunn, who were aboard said cruiser, was as follows:

1. Failure to keep a proper look-out on the tug while navigating at full speed through waters known to be crowded with traffic.

2. Failure of the said corporation, through its agents and servants, to keep a proper look-out on the barge towed by said tug while navigating at full speed through water known to be crowded with traffic.

3. Failure to have in force an adequate system of signaling between the tug and the barge.

4. Failure to lower a boat from the tug to carry on rescue operations after the casualty.

5. Failure to take any action on the barge to rescue the deceased or the surviving plaintiffs, Gerald A. Dunn and George D. DeBuse by the bargemen.

6. Failure on discovering the anchored vessel of the deceased to steer the course of the tug sufficiently to the right to avoid collision between the anchored vessel and the barge.

Exhibit A—(Continued)

7. Failure to keep clear of the anchored vessel.

8. Travelling at a rate of speed too great at the time and place in question considering that the said tug was being operated through waters known to be crowded with traffic.

9. Failure of tug and barge, moving vessels, to keep clear of the anchored vessel.

VII.

As a result of the foregoing acts of negligence the hawser between the tug and the barge became attached to the anchor line of the cruiser upon which the plaintiffs and the deceased were anchored and pulled it sideways after which the said barge ran into the said cruiser, turning it over, causing the death by drowning of the deceased, Charles DeBuse, and personal injuries to the plaintiffs George D. DeBuse, a minor, and Gerald A. Dunn.

VIII.

As a direct and proximate result of the aforesaid negligence of the defendants the plaintiff widow and the children above mentioned have been deprived of the love, affection, companionship, care and guidance of their husband and father; that the said Charles DeBuse, deceased, was forty years of age at the time of his death by drowning and had prior to his death earned between \$2,500.00 and \$3,500.00 per year and had a normal life expectancy of twenty-seven years; that by reason of the said death the plaintiff and her said children, for whose benefit this action is prosecuted, have been dam-

Exhibit A—(Continued)

aged by being deprived of the love, affection, companionship, care and guidance of the deceased and because of his loss of earnings in the sum of One Hundred Thousand Dollars (\$100,000.00).

For the second cause of action herein the plaintiff, Evelyn M. DeBuse, as administratrix in behalf of the estate, alleges:

I.

Plaintiff Evelyn M. DeBuse is the duly qualified and acting administratrix of the estate of Charles DeBuse, deceased, having been appointed in Probate Cause No. 108317 in the Superior Court of the State of Washington for King County and as such brings this action for the benefit of said estate.

II.

Plaintiff Evelyn M. DeBuse realleges paragraphs IV, V, VI and VII of her first cause of action as though fully set forth herein.

III.

As a result of the foregoing acts of negligence the cruiser, which was anchored, owned by the marital community comprising the deceased and the said Evelyn M. DeBuse, was run down by the said barge and turned over; that the reasonable cash market value of the said cruiser was depreciated by the said collision to the damage of the plaintiff as administratrix in the sum of Four Hundred Dollars (\$400.00).

For the third cause of action herein the plaintiff Evelyn M. DeBuse, as guardian ad litem of the Minor George D. DeBuse alleges:

Exhibit A—(Continued)

I.

Realleges Paragraphs II, IV, V, VI, and VII of the first cause of action as though fully set forth herein.

II.

At the time of said collision the minor plaintiff, George D. DeBuse, was on board the said cruiser and was thrown therefrom into the waters of Puget Sound, proximately causing personal injuries to the said minor as follows:

Enlargement of the cervical glands; injury to the right loin and back in the area of the posterior spine of the ileum; contusions and muscle sprains in said area followed by muscle spasms; pain in the left ear and reddening of the throat from exposure; and, nervous shock.

That the plaintiff believes, and therefore alleges, that the nervous shock to said minor is permanent to the plaintiff's damage in the sum of Twenty Five Hundred Dollars (\$2,500.00).

For the fourth cause of action herein the plaintiffs, Gerald A. Dunn and Gladys E. Dunn, his wife, allege:

I.

Reallege paragraphs III, IV, V, VI, and VII of the first cause of action, as though fully set forth herein.

II.

At the time of said collision the plaintiff, Gerald A. Dunn, was on board the said cruiser and was

Exhibit A—(Continued)

thrown therefrom into the water of Puget Sound, proximately causing personal injuries to the said plaintiff as follows:

Pharyngitis, laryngitis, tracheitis and bronchitis; bruises and swelling of the right forearm in the middle third of the ulnar border; generalized body aching and soreness; pain in the right inguinal region; the aggravation of a hernia existing prior to said collision causing a condition hastening the descent of the hernia; and nervous shock.

That the said plaintiff believes, and therefore alleges, that the aggravation of the said hernia and its effects are permanent and that the nervous shock to said plaintiff is permanent, all to the plaintiff's damage in the sum of Thirty Five Hundred Dollars (\$3,500.00).

Wherefore, these plaintiffs pray for judgment against the defendants, and each of them, as follows:

1. In favor of plaintiff Evelyn M. DeBuse, as administratrix for the benefit of herself as the wife of the deceased, Charles DeBuse, and George D. DeBuse and Roberta DeBuse, minor children of the deceased, in the sum of One Hundred Thousand Dollars (\$100,000.00).

2. In favor of plaintiff Evelyn M. DeBuse, as administratrix of the estate of Charles DeBuse, deceased, on the second cause of action in the sum of \$400.00.

3. In favor of plaintiff, Evelyn M. DeBuse, as guardian ad litem of the minor, George D. DeBuse,

Exhibit A—(Continued)

on the third cause of action in the sum of \$2,500.00.

4. In favor of plaintiffs, Gerald A. Dunn and Gladys E. Dunn, his wife, and the marital community composed of said Gerald A. Dunn and Gladys E. Dunn, on the fourth cause of action in the sum of \$3,500.00.

/s/ KAHIN, CARMODY & PEARSON,
Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Evelyn M. DeBuse, being first duly sworn, on oath deposes and says:

That she is one of the plaintiffs in the above entitled action; that she has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

EVELYN M. DeBUSE.

Subscribed and sworn to before me this 20th day of September, 1948.

/s/ JOE S. PEARSON,
Notary Public in and for the State of Washington,
residing at Seattle.

[Title of Superior Court and Cause No. 399916.]

MOTION FOR APPOINTMENT OF
GUARDIAN AD LITEM

The plaintiff, Evelyn M. DeBuse, moves the court for an order appointment her as guardian ad litem of her minor son, George D. DeBuse.

Exhibit A—(Continued)

The motion is based upon the affidavit of the petitioner and the records and files herein.

/s/ KAHIN, CARMODY & PEARSON,
Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Evelyn M. DeBuse, being first duly sworn on oath deposes and says:

That she is the mother of George D. DeBuse, a minor, age fourteen years, and that on or about the 25th day of July, 1948, said minor was injured by a tug and tow operated by the defendants on Puget Sound. That said George D. DeBuse has a meritorious cause of action against the defendants, and that this affiant should be appointed guardian ad litem of the said George D. DeBuse for the purposes of this suit.

/s/ EVELYN M. DeBUSE.

Subscribed and sworn to before me this 20th day of September, 1948.

/s/ JOE S. PEARSON,
Notary Public in and for the State of Washington,
residing at Seattle.

[Title of Superior Court and Cause No. 399916.]

ORDER FOR APPOINTMENT OF
GUARDIAN AD LITEM

This matter having come on regularly for hearing upon the motion of Evelyn M. DeBuse that she be

Exhibit A—(Continued)

appointed the guardian ad litem of her minor son, George D. DeBuse, age fourteen years, the court having read the affidavit of said petitioner and being fully advised in the premises, it is Now Therefore

Ordered, Adjudged and Decreed that the said Evelyn M. DeBuse be and she is hereby appointed guardian ad litem of the said George D. DeBuse.

Done in open court this 20th day of September, 1948.

/s/ DONALD A. McDONALD,
Judge.

Presented by:

/s/ JOE S. PEARSON,
For Kahin, Carmody & Pearson, Attorneys for
Plaintiffs.

[Endorsed]: Filed Oct. 8, 1948.

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Persons By These Presents: That we, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, Joseph Henry Harrison and Jane Doe Harrison, his wife, defendants above named, as Principals, and United States Fidelity and Guaranty Company, a corporation duly authorized to transact a surety business within the State of Washington, as Surety, are held and firmly bound unto Evelyn M. DeBuse, Administratrix of the Estate of Charles DeBuse, deceased, Evelyn M. DeBuse,

as guardian ad litem of George D. DeBuse, a minor, Gerald A. Dunn and Gladys E. Dunn, his wife, Plaintiffs above named, and each of them, in the full sum of Five Hundred Dollars (\$500.00) lawful money of the United States of America, for the payment of which well and truly to be made we, and each of us, bind ourselves, our personal representatives, successors and assigns, jointly and severally by these presents.

The condition of the foregoing obligation is such that,

Whereas, civil action pending in the Superior Court of the State of Washington for the County of King as No. 399916, wherein Evelyn M. DeBuse, Administratrix of the Estate of Charles DeBuse, deceased, Evelyn M. DeBuse, as guardian ad litem for George D. DeBuse, a minor, and Gerald A. Dunn and Gladys E. Dunn, his wife, are plaintiffs, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation and Joseph Henry Harrison and Jane Doe Harrison, his wife, are defendants, is being removed to the United States District Court for the Western District of Washington, Northern Division, pursuant to applicable provisions of law, as disclosed by petition of said defendants being filed herewith;

Now, Therefore, if said defendants shall pay all costs and disbursements incurred by reason of said removal proceeding should it be determined that said

action was not removable or was improperly removed, then this obligation shall be void; otherwise the same shall remain in full force and effect.

Dated this 8th day of October, 1948.

(Principals.)

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,
JOSEPH HENRY HARRISON, JANE DOE
HARRISON, his wife,

By /s/ LANE SUMMERS,
Of Attorneys for Defendants.

(Surety.)

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By /s/ (Illegible.)
As Its Attorney-in-Fact.

The foregoing bond approved.

Done this 8th day of October, 1948.

(Seal) /s/ LLOYD L. BLACK,
United States District Judge.

[Endorsed]: Filed Oct. 8, 1948.

[Title of District Court and Cause.]

NOTICE OF REMOVAL

To the Plaintiffs above named, and each of them, and
to Kahin, Carmody & Pearson, their attorneys:

Notice Is Hereby Given that petition for removal and bond on removal (a copy of each of which is herewith served upon you) have been filed this day with the Clerk of the United States District Court

for the Western District of Washington, Northern Division, and that like copy of said petition and of said bond, together with copy of this notice, will be filed this day with the Clerk of the Superior Court of the State of Washington for the County of King.

Dated this 8th day of October, 1948.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 9, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
OF STATE COURT

Know All Persons By These Presents:

That I, the undersigned, Clerk of the Superior Court of the State of Washington for the County of King, hereby certify that I received from attorneys for defendants above named and filed in my office on the 8th day of October, 1948, in civil action No. 399916 between plaintiffs above named and defendants above named, copy of the following:

1. Defendants' petition for removal together with Exhibit A therein mentioned;
2. Defendants' bond on removal;
3. Defendants' notice of removal.

In Witness Whereof I have subscribed the foregoing certificate and attached the seal of the Superior Court of the State of Washington for the County of King this 8th day of October, 1948.

(Seal) NORMAN R. RIDDELL,
Clerk.

[Endorsed]: Filed Oct. 9, 1948.

[Title of District Court and Cause.]

MOTION TO REMAND

Plaintiff, on the basis of the facts alleged in her complaint and in the accompanying affidavit of Joe S. Pearson hereto attached and made a part hereof, respectfully moves this court to remand this cause to the Superior Court of the State of Washington in and for King County from which court it was attempted to be removed to this court, for the following reasons and grounds:

1. The requisite diversity of citizenship required as a condition precedent to the jurisdiction of this court in a controversy of the character presented by the record in this cause does not exist.

2. This action does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court or as to the effect or construction of some law or treaty of the United States upon the determination of which the result depends.

3. This action does not really and substantially involve a dispute or controversy which depends upon the constitution or laws of the United States and

is not exclusively within the admiralty and marine jurisdiction of this court.

4. For other reasons apparent upon the face of the record.

Wherefore, plaintiffs pray that this cause may be remanded to the Superior Court of the State of Washington in and for King County to be there proceeded with according to the practice governing such cases.

Dated this 13th day of October, 1948.

.....,
Attorneys for Plaintiffs.

AFFIDAVIT OF JOE S. PEARSON

State of Washington,
County of King—ss.

Joe S. Pearson, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the plaintiffs in the above entitled action and makes this affidavit for and on behalf of the plaintiffs, being duly authorized to do so, for the purpose of supporting plaintiffs' motion to remand on file herein; that the plaintiff is a resident of King County, Washington, and that affiant is informed and believes, and therefore alleges, that one of the defendants, an indispensable party to this proceeding, Joseph Henry Harrison, is a resident of King County, Washington; that the deceased Charles DeBuse was not at

the time mentioned in the complaint an employee or agent of any firm or corporation engaged in maritime activities on the waters of Puget Sound; that this action is brought for wrongful death under and pursuant to the statutes of the State of Washington and that the death of the said deceased occurred within the said State of Washington.

/s/ JOE S. PEARSON.

Subscribed and sworn to before me this 13th day of October, 1948.

(Seal) /s/ CHARLES B. HOWARD,

Notary Public in and for the State of Washington,
residing at Seattle.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 28, 1948.

308 U. S. Courthouse, December 29, 1948.

Norman R. Riddell,
County Clerk,
9th Floor County-City Bldg.,
Seattle, Washington.

Dear Sir:

Pursuant to Title 28, U. S. Code, Sec. 1447, subparagraph E (being the Amended Judicial Code adopted Sept. 1, 1948) I enclose herewith a certified copy of an order remanding to the Superior Court of the State of Washington for the County of King that certain cause entitled Evelyn M. DeBuse, Ad-

ministratrix of the Estate of Charles DeBuse, etc.,
vs. Chicago, Milwaukee, St. Paul and Pacific Rail-
road Company, a corporation, et al.

Yours truly,

MILLARD P. THOMAS,
Clerk.

United States District Court for the Western
District of Washington, Northern Division

Civil No. 2112

EVELYN M. DeBUSE, Administratrix of the Es-
tate of Charles DeBuse, deceased; EVELYN M.
DeBUSE, as guardian ad litem for GEORGE D.
DeBUSE, a minor; and GERALD A. DUNN and
GLADYS E. DUNN, his wife,

Plaintiffs,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a corpora-
tion and JOSEPH HENRY HARRISON and
JANE DOE HARRISON, his wife,

Defendants.

ORDER OF REMAND

The above entitled civil action, after removal from
the Superior Court of the State of Washington for
the County of King to the above entitled court, hav-
ing come for hearing on the 28th day of December,
1948, before the undersigned Judge upon motion to
remand, and the Court having become advised from

written briefs and oral arguments of opposing counsel, submitted in behalf of both plaintiffs above named and defendants above named;

Now, Therefore, in harmony with oral ruling on said date, it is hereby Adjudged that neither said civil action as an entirety nor any separate cause of action alleged by the complaint herein was removable, and further it is hereby Ordered as follows:

1. That said civil action as an entirety, with each separate cause of action alleged by the complaint herein, is remanded to the Superior Court of the State of Washington for the County of King.

2. That costs be not allowed to or taxed for said plaintiffs.

Done in open court this 29th day of December, 1948.

LLOYD L. BLACK,
U. S. District Judge.

Exception by:

/s/ LANE SUMMERS,
Of Attorneys for Defendants.

Approved by:

/s/ JOSEPH PEARSON,
Of Attorneys for Plaintiffs.

Presented by:

/s/ LANE SUMMERS,
Of Attorneys for Defendants.

[Endorsed]: Filed Dec. 29, 1948.

Messrs. Jones & Bronson,
610 Colman Bldg.,
Seattle, Wash.

January 11, 1949

Messrs. Kahin, Carmody & Pearson,
835 Central Building,
Seattle, Washington.

Re: Evelyn M. DeBuse, Administratrix of the
Estate of Charles DeBuse, et al vs. Chicago,
Milwaukee, St. Paul & Pacific Railroad Com-
pany, et al.

Gentlemen:

Pursuant to the provisions of Rule 73(b) of the
Federal Rules of Civil Procedure, I am enclosing
herewith one copy of a notice of appeal filed January
11, 1949, in the above entitled cause, together with
one copy of the Bond on Appeal.

Yours very truly,

MILLARD P. THOMAS,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court: To Evelyn
M. DeBuse, as Administratrix, Evelyn M. De-
Buse as Guardian, Gerald A. Dunn and Gladys
E. Dunn, being all plaintiffs above named; and
to Kahin, Carmody & Pearson and Jones & Bron-
son, their attorneys:

Notice Is Given that Chicago, Milwaukee, St. Paul
& Pacific Railroad Company, a corporation, Joseph
Henry Harrison and Jane Doe Harrison ,his wife,

being all defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain final order in the above entitled action entered upon the 29th day of December, 1948, by the United States District Court for the Western District of Washington, Northern Division, remanding said action from that court to the Superior Court of the State of Washington for the County of King.

Dated this 11th day of January, 1949.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,

Attorneys for Defendants.

[Endorsed]: Filed Jan. 11, 1949.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Persons By These Presents:

That Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, Joseph Henry Harrison and Jane Doe Harrison, his wife, defendants above named, as Principals, and United States Fidelity and Guaranty Company, a corporation duly authorized to transact a surety business within the State of Washington, as Surety, are held and firmly bound unto Evelyn M. DeBuse as Administratrix, Evelyn M. DeBuse as Guardian, Gerald A. Dunn and Gladys E. Dunn, plaintiffs above named, in the full sum of Two Hundred and Fifty Dollars (\$250.00), for the payment of which well and truly

to be made we bind ourselves, our representatives, successors and assigns jointly and severally by these presents.

Whereas, in the above entitled action final order was entered in favor of said plaintiffs against said defendants by the United States District Court for the Western District of Washington, Northern Division, on the 29th day of December, 1948, remanding said action to the Superior Court of the State of Washington for the County of King, from which final order said defendants are appealing to the United States Court of Appeals for the Ninth Circuit in the time and manner provided by law;

Now, Therefore, the condition of the foregoing bond is such that if said principals shall pay in full all costs if said appeal is dismissed or said order is affirmed, or all such costs as the appellate court may award if said order is modified, then this bond shall be void; otherwise it shall continue in full force.

Dated this 11th day of January, 1949, at Seattle, Washington.

(Principals.)

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a corporation;
JOSEPH HENRY HARRISON, JANE
DOE HARRISON,

By /s/ LANE SUMMERS,

One of Their Attorneys.

(Surety.)

UNITED STATES FIDELITY & GUARANTY
COMPANY,

(Seal) /s/ (Illegible.)

Its Attorney-in-Fact.

[Endorsed]: Filed Jan. 11, 1948.

[Title of District Court and Cause.]

December 28, 1948

Black, J.

ORAL DECISION BY COURT ON
MOTION TO REMAND

The Court: In this case of Evelyn M. DeBuse and others, plaintiffs, versus Chicago, Milwaukee, St. Paul & Pacific Railroad Company and others, defendants, the plaintiffs seek in four causes of action to recover a total judgment of approximately \$106,400. Of that amount, as I remember it, \$100,000 is sought to be recovered for the death of Charles DeBuse. The action was started in the Superior Court of the State of Washington for King County. Both parties agree upon this motion of the plaintiffs to remand the four cases to the Superior Court of the State of Washington to the following:

1. That the action was properly instituted originally in the Superior Court of the State of Washington.

2. That it could properly have been instituted originally in this court.

Under Sections 1331-33 of the new judicial code, effective September 1 of this year, and Section 1441 of the same judicial code, it is clear that the action was not properly removable to this court unless at least one of the four causes of action was founded on a claim or right arising under the Constitution, treaties or laws of the United States as specified in subdivision (b) of such Section 1441 of the new judicial code. If any of said four causes of action

is founded on a claim or right arising under the Constitution, treaties or laws of the United States, then the entire action is removable, but in the event some of the causes of action if started independently would not have been properly removable, this district court has this election, first, to determine all the issues in the four causes of action, or in its discretion to remand all matters not otherwise within its original jurisdiction.

That last language is somewhat confusing. I am satisfied, however, that it would properly mean that if the cause of action in which plaintiffs seek to recover only \$400 was the only one properly removable to this court, that the court would not be compelled against its wish to try the three other causes of action involving \$106,000. I confess that the language of that proviso for remanding a portion of the causes of action is not as happy or as clear as I wish it had been.

It apparently is conceded by both sides that there is no right of removal to this court from the state court of any of such four causes of action upon the ground of diversity of citizenship. The issue then is squarely dependent upon whether or not any of the four causes of action combined in the complaint are founded on a claim or right arising under the Constitution, treaties or laws of the United States.

The plaintiffs vigorously contend that each and all of the four causes of action depend upon state law. The defendants at least as vigorously contend that each of the four causes of action is founded on rights or claims arising under the maritime law, and in such connection most vigorously assert that the

maritime law, whether of statute or decision, is the law of the United States. Thus the defendants contend that any civil action of maritime jurisdiction, regardless of amount involved or of the citizenship of the defendants may be removed properly to the federal court.

The defendants in this case have not given me any assistance upon one problem that perplexes me, and that is whether or not the second, third and fourth causes of action, or any of them have any greater right to be in this court than the first death cause of action. Plaintiffs have attempted to give me some assistance on that perplexing problem. If they have given me the assistance I needed, I have not been appreciative of their having solved the question. That means that plaintiffs may have fulfilled their duty in that respect and that I have failed to understand.

I am not convinced that the maritime law is necessarily the law of the United States as contemplated by the language of subdivision (b), Section 1441, where it is stated that a requisite for removal to the district court is that a civil action is founded on a claim or right arising under the Constitution, treaties or laws of the United States. Section 1333 of the Judicial Code does say that the district court shall have original jurisdiction exclusive of the courts of the state of any civil case of admiralty or maritime jurisdiction, saving to the libelant or petitioner in every case any other remedy to which he is otherwise entitled. But I am not convinced that when this Section 1333 says that the district courts shall have original jurisdiction of a civil case of maritime juris-

diction that that necessarily means that the maritime law is the law of the United States in the sense referred to in the subdivision (b) of Section 1441. In fact, in many instances I am satisfied from the decisions that the district courts have original jurisdiction of maritime cases arising under the state law. Such decisions do not appear to me to say that the state law has become the law of the United States. Such decisions to me seem to say that the district courts shall have original jurisdiction of such maritime cases although they are enforcing state laws.

I have no absolute confidence in the correctness of my conclusion. Much of Mr. Summers' able argument is most persuasive to me. Much of it is persuasive by reason of the argument itself. Considerable of it is persuasive to me because I recognize him as an expert in the field of maritime jurisprudence. I have to decide this matter, however, upon the way it appeals to me. I cannot delegate my decision to an attorney or proctor learned in the law of admiralty. The argument as presented to me by counsel for the plaintiffs is more persuasive to me than is that of the defendants, that is, I am much more inclined to the opinion that these causes of action are not founded on a claim or right arising under the Constitution, treaties or laws of the United States than I am that they are founded on a claim or right arising under the Constitution, treaties, or laws of the United States.

It seems to me, as stated in the case of *Western Fuel Company vs. Garcia*, 66 Law Edition 210, that the rules accepted and applied in admiralty courts are controlling wherever this action shall be tried,

whether in this court or the Superior Court of the State of Washington. Again, the fact that the rules accepted and applied in the admiralty and maritime courts of the United States may control does not make the claims or rights founded on the Constitution, treaties or laws of the United States.

I have already conceded that I am not confident that I am correct. I think, however, that it is more likely that I am correct in ordering these four causes of action remanded to the Superior Court than I would be in denying such motion to remand.

In addition, the issue is very important. If in every civil case, regardless of amount of citizenship, based upon a maritime condition the action is removable to the federal court, that should be soon known. My order to remand will give an opportunity to appeal and secure an early determination of this perplexing question. My refusal to remand it would delay that determination for a long time.

Personally, I have not thought it made much difference in this action whether the action stayed here or was remanded to the state court. Respective counsel, however, unquestionably differ much with me on that issue. I can think of a number of reasons that might appeal to either counsel, but I confess they would not appeal to me as very vital if I were the attorney on either side of this case. However, I am not.

Plaintiffs have the right to have this case tried in the state court if the defendants had no right to remove it. The defendants, of course, are entitled to have it tried in this court if the action was properly removable. I hold that I am more satisfied

that it was not properly removable than the contrary.

The motion to remand is granted and exception allowed.

Mr. Pearson: Will the Court indicate whether costs are to be awarded in connection with the order to remand?

(Discussion off the record with the consent of all counsel.)

The Court: Under the circumstances, counsel, if the allowance or disallowance of costs is discretionary with me, no costs will be allowed. I hope counsel can agree upon the question at the time order is presented. Thank you.

CERTIFICATE

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

[Endorsed]: Filed Jan. 20, 1949.

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF RECORD
ON APPEAL

Pursuant to Federal Rules of Civil Procedure Rule 75(o) and Rule 11(1) of the United States Court of Appeals for the Ninth Circuit (in the absence of stipulation), appellants above named hereby designate the entire record in the above entitled action, including all original papers on file, as and for the record on appeal in said action to the United States Court of Appeals for the Ninth Circuit, it being hereby requested that all of such original papers, with identifying certificate appended thereto, be transmitted forthwith to the Clerk of said appellate court.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Appellants,
(Defendants).

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 15, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellants above named upon their appeal in the above entitled action rely upon the following points:

1. That the above entitled action, involving a maritime tort—a collision between vessels in navigable waters of Puget Sound—arises under the Constitution and laws of the United States and within the admiralty and maritime jurisdiction thereof;

2. That the United States District Court for the Western District of Washington, Northern Division, has original jurisdiction respecting the above entitled action, considered entirely, and each cause of action alleged by the complaint herein, considered separately—all without regard to diversity of citizenship or amount in controversy;

3. That the above entitled action as a whole and all causes of action alleged by the complaint herein are removable from the Superior Court of the State of Washington for the County of King to the United States District Court for the Western District Court of Washington, Northern Division;

4. That the United States District Court for the Western District of Washington, Northern Division, erred in failing to maintain its said jurisdiction respecting the above entitled action and all causes of action alleged by the complaint herein;

5. That the United States District Court for the Western District of Washington, Northern Division, erred in remanding said action and all causes

of action alleged by the complaint herein by its "Order of Remand" entered on the 29th day of December, 1948, from which appellants have appealed.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Appellants,
(Defendants).

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 15, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO ORIGINAL
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle as requested in the designation of counsel for appellants, as follows:

1. Petition for Removal, filed Oct. 8, 1948.

2. Bond on Removal, filed Oct. 8, 1948.
3. Notice of Removal, filed Oct. 9, 1948.
4. Certificate by Clerk of State Court, filed Oct. 9, 1948.
5. Motion to Strike, filed Oct. 27, 1948.
6. Motion to Remand, filed Oct. 28, 1948.
7. Motion of Hearing Motion to Remand, filed Oct. 28, 1948.
8. Affidavit of Joe S. Pearson, filed Oct. 28, 1948.
9. Plaintiffs' Trial Memorandum on Motion to Remand, filed Nov. 18, 1948.
10. Defendants' Brief Resisting Motion to Remand, filed Nov. 30, 1948.
11. Plaintiffs' Revised Trial Memorandum on Motion to Remand and Reply Brief to Defendants' Brief Resisting Motion to Remand, filed Dec. 6, 1948.
12. Defendants' Second Brief Supporting Removal, filed Dec. 13, 1948.
13. Plaintiffs' Supplemental Memorandum of Authorities on Motion to Remand, filed Dec. 20, 1948.
14. Plaintiffs' Second Supplemental Memorandum of Points and Authorities on Motion to Remand, filed Dec. 28, 1948.
15. Order of Remand, filed Dec. 29, 1948, with Clerk's copy of letter to Riddell attached.
16. Notice of Appeal, filed Jan. 11, 1949, with Clerk's copy of letter to attorneys attached.
17. Bond on Appeal, filed Jan. 11, 1947.
18. Oral Decision by Court on Motion to Remand, filed Jan. 20, 1949.

19. Appellants' Designation of Record on Appeal, filed Feb. 15, 1949.

20. Statement of Points, filed Feb. 15, 1949, and that said pleadings and papers constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit from Order of Remand filed and entered in this cause December 29, 1948.

In Witness Whereof I have hereunto set my hand and official seal at Seattle, this 16th day of February, 1949.

(Seal) MILLARD P. THOMAS,
Clerk.

[Endorsed]: No. 12187. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Joseph Henry Harrison and Jane Doe Harrison, his wife, Appellants, vs. Evelyn M. DeBuse, Administratrix of the Estate of Charles DeBuse, deceased, Everyn M. DeBuse, as Guardian ad Litem for George D. DeBuse, a minor, and Gerald A. Dunn and Gladys E. Dunn, his wife, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12187

EVELYN M. DeBUSE, Administratrix of the Estate of Charles DeBuse, deceased; EVELYN M. DeBUSE, as Guardian ad Litem for GEORGE D. DeBUSE, a minor; and GERALD A. DUNN and GLADYS E. DUNN, his wife,

Appellees,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation, and JOSEPH HENRY HARRISON and JANE DOE HARRISON, his wife,

Appellants.

APPELLANTS' DESIGNATION OF
PORTIONS OF RECORD TO BE PRINTED

Pursuant to Rule 19(6) of the United States Court of Appeals for the Ninth Circuit, appellants above named hereby designate for printing by the Clerk of the United States Court of Appeals for the Ninth Circuit as being all of the record on file in the above entitled action material to the consideration of such appeal by said Court, the following:

1. Petition for Removal;
2. Complaint of the plaintiffs, contained in Exhibit A attached to the Petition for Removal;
3. Bond on Removal;
4. Notice of Removal;
5. Certificate by Clerk of the state court;

6. Motion to Remand;
7. Opinion of United States District Judge ruling upon Motion to Remand;
8. Order of Remand;
9. Notice of Appeal;
10. Bond on Appeal;
11. Appellants' Designation of Record on Appeal;
12. Appellants' Statement of Points;
13. Appellants' Designation of Portions of Record to be Printed.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed February 17, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANTS' AFFIRMATION AND
ADOPTION OF STATEMENT OF POINTS

Appellants hereby adopt and affirm "Statement of Points" (heretofore served upon appellees and filed with the Clerk of the lower court, and now contained in record on appeal) as Statement of Points required by Rule 19(6) of the rules of the above entitled Court.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed February 23, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF ADDI-
TIONAL PORTION OF RECORD
TO BE PRINTED

Pursuant to Rule 19(6) of the United States Court of Appeals for the Ninth Circuit, appellees above named hereby designate for printing by the Clerk of the United States Court of Appeals for the Ninth Circuit as being a portion of the record on file in the above entitled action and material to the consideration of such appeal by said Court and in addition to that heretofore designated for printing by appellants, the following:

1. United States District Clerk's copy of letter to Norman Riddell, King County Clerk, which is attached to order of remand filed December 29, 1948.

KAHIN, CARMODY &
PEARSON,

/s/ JOSEPH H. PEARSON,
JONES & BRONSON,

/s/ HARRY B. JONES, JR.,
Attorneys for Appellees.

(Acknowledgment of Service.)

[Endorsed]: Filed February 25, 1949. Paul P. O'Brien, Clerk.

United States
Court of Appeals
for the Ninth Circuit

MARION J. MURPHEY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY and ROBERT MARION MURPHEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Northern Division

FILED
MAY 25 1949

PAUL P. O'BRIEN,
CLERK

United States
Court of Appeals
for the Ninth Circuit

MARION J. MURPHEY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY and ROBERT MARION MURPHEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FRANCIS E. HARRINGTON,

1124 Cascade Bldg.,
Portland 4, Oregon,

WILLIAM B. WETHERALL,

c/o Malone & Sullivan,

Mills Bldg.,
220 Bush St.,

San Francisco 4, California,

Attorneys for Plaintiffs.

EMMETT J. SEAWELL,

Assistant U. S. Attorney,
Northern District of California,
Sacramento 6, California,

Attorney for the Defendant. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the Northern District of California,
Northern Division

No. 5809

MARION J. MURPHEY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY, and ROBERT MARION MURPHEY,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

Plaintiffs complain and allege:

I.

Jurisdiction of this action is conferred upon the Court by the Act of August 2, 1946, Chapter 753, Title IV, Section 410, 6060 Stat. 843 (28 U.S.C.A. 931).

II.

Huldah Murphey died in Del Norte County, State of California, on the 13th day of July, 1945, leaving surviving her as her only heirs, the following named persons:

Marion J. Murphey, the surviving spouse of Huldah Murphey, deceased, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Elizabeth Irene Shwartz, daughter of the said Huldah Murphey, who is of legal age, and is a resident of Portland, Multnomah County, Oregon. [3]

Marjorie Josephine Preskey, daughter of the said Huldah Murphey, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Robert Marion Murphey, son of the said Huldah Murphey, who is of legal age, and is a resident of Eugene, Lynn County, Oregon.

At the time of her death, the said Huldah Murphey was of legal age, and was an adult over the age of 21 years.

III.

At all times herein mentioned there was and now is in full force and effect in the State of California, Section 377 of the Code of Civil Procedure of the State of California, which provides as follows:

“When the death of a person not being a minor or when the death of a minor person who leaves surviving him either a husband or wife or child or children is caused by the wrongful act of neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be judged.”

IV.

On July 12, 1945, at approximately 10:30 p.m., the said Huldah Murphey was proceeding as a pedestrian, with four other persons, to cross a bridge

in Del Norte County, California, in or near the city or town of Klamath, California, known as Jimmy Jack Bridge. Said bridge was a private bridge and way for the use of pedestrians, and was approximately ten feet wide overall and approximately 113 feet in length. Said bridge had no railings at the sides.

V.

While Huldah Murphey was crossing said bridge, and at the time when she was approximately one-half way between one end of the bridge and the other, she was forced off the bridge and fell to the ground below, a distance of approximately 14 feet 8 inches, by a motor vehicle of the United States Army which was then and there being operated by Paul Brander who was then and there a member of the Armed Forces of the United States acting in the line of duty. [4]

VI.

At and immediately prior to the time that said motor vehicle forced Huldah Murphey off the Bridge, the said Paul Brander drove and operated said motor vehicle in a careless and negligent manner in that:

(a) He negligently drove and operated said motor vehicle on a private way intended only for the use of pedestrians.

(b) He negligently failed to keep a proper or any lookout for pedestrians on the bridge, and particularly the plaintiff.

(c) He negligently drove and operated said motor vehicle upon and across said bridge at a high

and excessive rate of speed under the circumstances, to-wit, in excess of 15 miles per hour.

(d) He negligently drove said motor vehicle upon and across said bridge while it was occupied by pedestrians.

(e) He negligently drove said motor vehicle onto and across said bridge in disregard of the signal of a pedestrian to slow down or stop to avoid injury to the pedestrians on the bridge, although he either saw said signal or would have seen the same if he had been driving and operating the motor vehicle in the exercise of due care under the circumstances then and there existing.

(f) He negligently drove and operated said motor vehicle past the pedestrians on the bridge, including the plaintiff, without stopping and without slowing down sufficiently to avoid hazard and risk of injury to said pedestrians, including the plaintiff.

(g) He drove and operated said motor vehicle into and upon said bridge and toward and past the pedestrians thereon with the lights of said motor vehicle, which were very bright, turned on full and without dimming said lights so as to make it possible for the pedestrians on the bridge to step safely toward and to the edge thereof while said motor vehicle was passing them.

(h) He negligently operated said motor vehicle in such a direction, speed and manner as to cause it to force the said Hulda Murphey off of the bridge on which she was standing and causing her to fall a

distance of [5] approximately 14 feet 8 inches from said bridge to the ground below.

VII.

As the direct and proximate result of the negligence of the said Paul Brander as hereinbefore alleged, and the fall resulting therefrom, the said Huldah Murphey sustained personal injuries and severe shock, which resulted in her death on July 13, 1945.

VIII.

The heirs of the said Huldah Murphey, who are the plaintiffs herein, have suffered pecuniary loss from her death to the extent of \$30,000.00, to their damage in said sum.

IX.

The said Marion J. Murphey, as the surviving spouse of Huldah Murphey, suffered pecuniary damage from her death, in addition to the general damages herein before alleged, in that he was required to pay for funeral services and expenses for the said Huldah Murphey in the sum of \$490.00, to his damage in said sum.

Wherefore, the plaintiffs pray for judgment against the United States of America in the sum of \$30,000.00, and for the further sum of \$490.00, for a reasonable attorney's fee and for their costs and disbursements herein.

/s/ FRANCIS E. HARRINGTON,

/s/ WILLIAM B. WETHERALL,

Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 12, 1948. [6]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Now comes the defendant, United States of America, and answering the complaint of plaintiffs on file herein, admits, denies and alleges as follows:

I.

Admits the allegations set forth in Paragraphs I, and III of Plaintiffs' complaint.

II.

Answering the allegations set forth in Paragraphs II, IV, VI, VII, VIII, and IX of said complaint (and at all times denying negligence and/or carelessness), defendant alleges it has no information or belief concerning said allegations sufficient to enable it to answer the same, and for that reason and upon that ground it denies generally and specifically each and all of said allegations, and denies that plaintiffs have been damaged in the sum [7] of Ten Thousand, Four Hundred Ninety Dollars (\$10,490.00) and/or in any other sum, and/or at all.

III.

And as a further specific and distinct defense, and answering the allegations set forth in Paragraph V of said complaint, defendant alleges that at the time mentioned in said complaint, July 12, 1945, and at approximately 10:30 p.m. the driver of said government vehicle in question was not at said time acting within the scope of his office or employment but to the contrary was operating said government vehicle contrary to authorization and direction.

Wherefore, defendant prays that it may be hence dismissed with its costs of suit herein incurred, and for such other, further and different relief as may appear meet and proper in the premises.

FRANK J. HENNESSY,
United States Attorney,

By /s/ HARLAN M. THOMPSON,
Assistant U. S. Attorney.

[Endorsed]: Filed Dec. 18, 1947. [8]

[Title of District Court and Cause.]

OPINION AND ORDER

This action is brought by the heirs at law of Huldah Murphey to recover the pecuniary loss sustained by them resulting from her death. Section 377 of the Code of Civil Procedure of the State of California gives a right of action to the heirs at law against the tortfeasor causing the death and against the employer responsible for his conduct.

Huldah Murphey was struck by a motor vehicle owned by defendant, United States of America, and driven at the time by Paul Brander, a member of the Army Air Corps of defendant. Brander was a staff sergeant stationed at a radar establishment with a complement of about twenty soldiers, located a short distance from the town of Klamath, California. A carry-all owned by defendant was customarily used by the men stationed at the post to convey them to the town of Klamath for their en-

tertainment when off duty. This was done under the authority of the commanding officer. Under this authority the vehicle was to be left parked to the side of a building in the town and remain there until the evening's entertainment was over, at which time it was used to re-convey the men to the post. Special permission was [9] required to use the vehicle for the pleasure of the men to go to any place other than Klamath. During the evening in question, Brander drove several men to the town, parked the vehicle as required and was walking around the town when he met another one of the men from the establishment, Sergeant Warneck. Warneck suggested that the two attend an "Indian Shaker ceremonial dance" which was in progress near-by. The two men got into the carry-all and started for the dance. After proceeding a short distance they met two of Warneck's women acquaintances. The ladies were accosted and they stated that they were on their way to the same dance. They accepted an invitation to get into the machine and the four proceeded on. The place where the dance was held was about six hundred to a thousand feet distant from the center of the town of Klamath. It was during the ride to that place that the fatal accident occurred.

There is no occasion to recount the evidence upon which the negligence of the driver of the government vehicle is predicated. I do not understand counsel for the government to seriously question that such negligence has been established. The court is satisfied that it abundantly appears from the evi-

dence that the death of Mrs. Murphey proximately resulted from the negligence of the driver, negligence which may be described as gross.

Plaintiffs proceed under two theories. The first theory is that the government is liable under the so-called "permissive use" statute of the State of California. And the second theory is under the rule of respondeat superior.

The first theory can be readily disposed of. The statute dealing with tort claims against the United States confers [10] exclusive jurisdiction upon the District Courts of the United States of claims against the United States for money damages on account of death caused by the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant for such * * * death, in accordance with the law of the place where the act or omission occurred." The succeeding sentence reads, "Subject to the provisions of this title, the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages." There is no need to apply the rule that statutes waiving sovereign immunity are subject to strict construction. There is nothing in the quoted sentences which requires construction. These sentences are free from ambiguity. The second sentence

creates the right against the government, but the first sentence must be referred to in determining the meaning of the words "such claims, to the same claimants." The claims have reference to those inuring to the benefit of claimants who are injured through the negligence of an employee of the government while acting within the scope of his office or employment. This excludes any obligation on the part of the government for torts committed by its officers or employees occurring while the officer or employee is not acting within the scope of his employment. It follows that Section 402 of the California Vehicle Code, which creates a cause of [11] action against the owner of a motor vehicle for the negligence of one who is driving the same under his permission, without regard to whether at the time the driver was in the service of the owner, has no application.

The question next met is whether the United States at any time after the machine left the post was the employer, in the sense that the machine was being used in the business of the United States. It is established that the vehicle which ran into Mrs. Murphey was the property of defendant and that the driver was a soldier in the United States Army. In California proof of ownership gives rise to the inference that the driver was on the business of the owner, if the driver was at the time the employee of the owner. *Stewart v. Norsigian*, 64 Cal. App. 2d 540; *Heglin v. F.C.B.A. Market Inc.* 70 Cal. App. 2d 803. If evidence contrary to the inference is clear, positive, uncontradicted, and of such a nature that

it cannot rationally be disbelieved, the right to draw the inference disappears. *Blank v. Coffin*, 20 Cal. 2d 457. The question of the agency then becomes one of law. In the absence of evidence to that degree, there is presented a question of fact as to whether the inference shall or shall not be drawn.

The vehicle had been habitually used and was used that evening in conveying the military personnel from the military grounds to the town of Klamath. As stated, this was done under permission of the commanding officer, who had authority to give such permission. That the machine was being used to afford pleasure and amusement for the men does not necessarily negative agency. The amusement of the men may be a part of defendant's business. *Jacobus v. Brero*, 190 Cal. 375. Where the term "scope of employment" is involved [12] all relevant circumstances are to be considered and weighed in relation to one another. However, I do not find it necessary to come to a resolve upon this point since I am persuaded that, assuming but not deciding the use of the automobile while conveying the men to Klamath was within the scope of employment, there appears in the evidence proof that at the time of the accident the vehicle was not being so used. I come to this conclusion for two reasons. The first is that the use to which it was being put at the time of the accident was beyond the permitted use and contrary to the instructions of the officer in charge. Perhaps more importance should be attached to the second reason, namely, that at the time in question the vehicle was being used by the two

sergeants for their own personal ends. Where the purpose of the trip is confined to the driver's own personal business no liability attaches to the employer. *Hanchett v. Wiseley*, 107 Cal. App. 230; *Lane v. Bing*, 202 Cal. 577; *Kish v. California S. Automobile Assn.* 190 Cal. 248; *Walters v. West. Am. Ins. Co.*, 4 Cal. App. 2d 583; *Newman v. Steuernagel*, 132 Cal. App. 417. If the employer has entrusted his automobile to an employee for use by the employee in the employer's business the employer is not liable for the torts of the employee occurring while the employee is pursuing his own pleasure, and his activities are disassociated from the performance by him of any business of his employer. *Wober v. Allen Co.*, 64 Cal. App. 274; *Grisim v. Blumenthal & Co.*, 76 Cal. App. 712. This is true (absent a statute imputing to the owner the negligence of the driver—Section 402 California Vehicle Code) though the employee has the permission of the employer to use the latter's automobile in [13] the former's enjoyment. *Hall v. The Puente Oil Co.*, 47 Cal. App. 611.

Where the undisputed evidence positively shows that the employee was using the car for his own personal pleasure, without permission of the employer, and not performing any business of the employer, the right to draw the inference of agency is dispelled, *Bourne v. North. Counties Title Ins. Co.*, 4 Cal. App. 2d 69. Such is the situation in the instant case. The inference of agency is here overcome and there is as a matter of law no basis for its application.

Plaintiffs would draw to their aid the definition in the Tort Claims Act wherein it is stated "acting within the scope of his office or employment" when applied to a member of the military or naval forces of the United States means "acting in the line of duty." There is a clear distinction between "scope of employment" and "line of duty." *LaBella v. Southwestern Bell Telephone Co.*, 24 S.W. 2d 1072. But the act here comes within neither term. The cases recognize that something done by a soldier or sailor in the service of the United States in pursuance of a private avocation, or which is not a logical incident of provable effect of duty in the service is not done in the line of duty. *Collins v. Dollar S.S. Lines*, D.C.N.Y. 23 F. Supp. 395; *Hutchens v. Covert*, 78 N.E. 1061. The act to be one in the line of duty must have relation to causation, mediate or immediate, to the duty owed by the actor. *Rhodes v. United States*, 79 F. 740. Brander was not engaged in the performance of any duty to the United States at the time of the accident.

Judgment will be in favor of the defendant. Findings of fact will be submitted in conformity to the local rule.

Dated: August 3rd, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Aug. 3, 1948. [14]

MINUTES OF COURT

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of San Francisco, on Tuesday, the 3rd day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Dal M. Lemmon, District Judge.

[Title of Cause.]

This case having been heretofore tried and submitted, being now fully considered, it is, in accordance with an opinion and order this day signed and filed, Ordered that judgment be entered herein in favor of the defendant and against the plaintiffs, with costs, upon findings of fact and conclusions of law and judgment to be prepared by counsel for the defendant and submitted to the Court in conformity with the local rule. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on for trial on June 1, 1948, before the Court sitting without a jury, and the Court having heard the testimony and evidence introduced by deposition on behalf of the defendant and having examined the documentary proof offered by the parties, and the cause having been argued on June

1, 1948, and submitted by the parties, and the Court being fully advised in the premises, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That Huldah Murphey died in Del Norte County, State of California, on the 13th day of July, 1945, leaving surviving her as her only heirs at law the following named persons:

Marion J. Murphey, the surviving spouse of Huldah Murphey, deceased, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Elizabeth Irene Schwartz, daughter of the said Huldah [16] Murphey, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Marjorie Josephine Preskey, daughter of the said Huldah Murphey, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Robert Marion Murphey, son of the said Huldah Murphey, who is of legal age, and is a resident of Eugene, Lynn County, Oregon.

2. That at all times herein mentioned there was and now is in full force and effect in the State of California, Section 377 of the Code of Civil Procedure of the State of California, which provides as follows:

“When the death of a person not being a minor or when the death of a minor person who leaves surviving him either a husband or wife or child or children is caused by the wrongful

act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be judged.”

3. That on July 12, 1945, at approximately 10:30 p.m., the said Huldah Murphey was proceeding as a pedestrian, with four other persons, to cross a bridge in Del Norte County, California, in or near the city or town of Klamath, California, known as Jimmy Jack Bridge. Said bridge was a private bridge and way for the use of pedestrians, and was approximately ten feet wide overall and approximately 113 feet in length. Said bridge had no railings at the sides.

4. That while Huldah Murphey was crossing said bridge, and at the time when she was approximately one-half way between one end of the bridge and the other, she was forced off the bridge and fell to the ground below, a distance of approximately 14 feet 8 inches, by a motor vehicle owned by [17] the United States of America which was then and there being operated by Paul Brander. That the said Paul Brander was at said time a member of the Armed Forces of the United States, but was not acting in the line of duty and was not acting within the scope of his office or employment with the United States of America.

5. That the said Paul Brander at said time and place drove and operated said motor vehicle in a negligent manner and that said negligence consists of the particulars set forth in paragraph V of plaintiff's amended complaint.

6. That as a proximate result of the said negligence of the said Paul Brander the said Huldah Murphey sustained personal injuries which resulted in her death on July 13, 1945.

7. That prior to the date of the said accident the said motor vehicle had been customarily used by the members of the Army Air Corp for the purpose of transporting said members to the town of Klamath from the Army radar station located a few miles from the town of Klamath, and that such use of said motor vehicle by the said members of the said Army Air Corp was under the permission and authority of the commanding officer of such radar station and was used under such direction and authority for the sole purpose of transporting said members of such radar station when off duty from said station to the town of Klamath where the said members after being so transported had been in the custom of finding pleasure and amusement. The said members of the said Army Air Corp were authorized and directed to park the said vehicle to the side of a building in the said town where the said vehicle was required to remain until the evening's entertainment was over, at which time it was to be used to reconvey the men to the said radar station. Special permission was required to use the vehicle for the pleasure of the men to go to any [18] place other than Klamath, and that

neither the said Paul W. Brander, nor any other member of said Army Air Corp, was authorized to operate the motor vehicle for his or their personal uses, or for any other uses, than that hereinbefore set forth. That at the time in question the said Paul W. Brander was using said motor vehicle beyond the permitted use and contrary to the instructions and authority aforesaid and it was being used by the said Brander for his own personal use and business.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts the court concludes that the plaintiffs are not entitled to a judgment against the defendant.

That at the time of said accident the said motor vehicle was not being operated by an employee of the defendant while acting within the scope of his office or employment.

The defendant is entitled to its costs and disbursements incurred herein. Let judgment be entered accordingly.

Dated: September 21st, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

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1 [Endorsed]: Filed Sept. 21, 1948. [19]

In the District Court of the United States for the
Northern District of California, Northern
Division

No. 5809

MARION J. MURPHEY, et al.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT AFTER TRIAL BY COURT

This cause came on for trial on June 1, 1948, before the Court sitting without a jury, and the Court having heard the testimony and evidence introduced by deposition on behalf of the defendant and having examined the documentary proof offered by the parties, and the cause having been argued and submitted and the Court being fully advised in the premises and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith;

Now, Therefore, by reason of the law and findings aforesaid;

It is hereby Ordered, Adjudged and Decreed that the plaintiffs are not entitled to a judgment in their, or either of their favor and against the defendant, and it is further adjudged and decreed that judgment be entered herein in favor of the defendant against the plaintiffs for its costs of [20]

suit herein incurred in the sum of \$.

Dated: September 21st, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

Entered in Civil Docket Sept. 22, 1948. C. W. Calbreath, Clerk. By F. M. Lampert, Deputy Clerk.

[Endorsed]: Filed Sept. 21, 1948. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Marion J. Murphey, et al., plaintiffs herein, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that judgment entered against them and in favor of the United States of America on September 22, 1948.

/s/ FRANCIS E. HARRINGTON,

Of Counsel for Plaintiffs-
Appellants.

[Endorsed]: Filed Dec. 21, 1948. [22]

In the District Court of the United States for the
Northern District of California, Northern
Division

Before: Hon. Dal M. Lemmon, Judge.

Civil No. 5809

MARION J. MURPHEY, et al.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

June 1, 1948

Appearances: For the Plaintiffs: Francis E. Harrington, Esq., 520 S. W. 6th Avenue, Portland 4, Oregon, and William B. Wetherall, Esq., c/o Malone & Sullivan, Mills Tower Building, San Francisco, California. For the Defendant: Harlan M. Thompson, Esq., Ass't United States Attorney, Sacramento, California. [1*]

* * * *

Mr. Harrington: At this time, if the Court please, as a part of the plaintiff's case, the plaintiff would like to read into evidence two depositions taken by the defendant, on behalf of the defendant. The first deposition I will read is the deposition of Richard Francis Simon, taken on behalf of the defendant at 212 Federal Building, Toledo, Ohio, Tuesday, March 16th, 1948, at 10:00 o'clock.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Notice was given to me as counsel for the plaintiffs of [27] the taking of the deposition; and being unable to be present personally, or arrange for representation, I sent to the United States Attorney at Toledo, a series of interrogatories to be put to the witness. There is a stipulation between counsel that the signature of the witness to the deposition is waived and that the deposition may be read at the time of the trial, with the customary objections to the question.

The appearances were Mr. Marcus L. Friedman, Assistant United States Attorney, on behalf of the defendant; and no one appearing on behalf of the plaintiff.

(Reading.)

“Thereupon,

RICHARD FRANCIS SIMON,
being first duly sworn as provided by law, testified
as follows:

“Direct Examination

“By Mr. Friedman:

“Q. Will you please say your name?

“A. Richard Francis Simon.

“Q. Where do you live, Mr. Simon?

“A. Beaverdam, Ohio.

“Q. Calling your attention to the night of July 12, 1945, where were you then located?

“A. I was serving in the Army at the outskirts of the town of Klamath, California.

“Q. What was your occupation at that time?

(Deposition of Richard Francis Simon.)

“A. An officer in the United States Army.

“Q. When you say officer, what rank did you hold?

“A. A Lieutenant. First Lieutenant. [28]

“Q. Where were you stationed?

“A. Klamath, California.

“Q. In what capacity?

“A. As commanding officer of a radar establishment.

“Q. How long prior to July 12 were you stationed at Klamath, California, approximately?

“A. I'll say approximately one to two months.

“Q. And how long after July 12, 1945, were you stationed there?

“A. Approximately three months.

“Q. I would like to have you explain your duties as commanding officer of this radar station at Klamath, California.

“A. I was,—my primary duty was Administrative Officer for the records, and housing and feeding of the troops stationed there.

“Q. Were you an officer that assigned specific duties to any other Army personnel there?

“A. Yes.

“Q. And did you assign any such duties to one Sergeant Paul F. Brander? A. Yes.

“Q. What duties did you assign to him?

“A. His primary duty was maintenance man, to keep the radar in operation. [29]

“Q. What were his secondary duties?

“A. His secondary duties were non-com

(Deposition of Richard Francis Simon.)

missioned officer in charge of personnel when I wasn't around, and authorized driving a pass truck.

“Q. Now, I wish you would explain what you mean by ‘authorized driver of a pass truck?’

“A. An authorized driver of a pass truck is a man who was issued a license by the United States Government to operate one of their vehicles in any capacity, which means he could move troops, operate a truck for pleasure or for supplies.

“Q. When you say he could use a truck for pleasure, do you mean under your instructions, or at his own will? A. Under instructions.

“Q. That is, under instructions of the commanding officer? A. Yes.

Mr. Thompson: Pardon me one moment on that question. Going back down “under your instructions.” Did you read “your”? I wasn't certain.

Mr. Harrington: I believe I did.

The Court: Well, that is all right. If you didn't, you can correct it.

Mr. Harrington (Reading): [30]

“Q. On the night of July 12, 1945, did Sergeant Brander have such authority to drive a pass truck into the town of Klamath? A. Yes.

“Q. What time did he leave the Camp for Klamath, if you know? A. Unknown.

“Q. Can you give us the approximate time?

“A. Approximately 6:30 or 7:00 o'clock in the evening, which was usually the regular time they went in.

(Deposition of Richard Francis Simon.)

“Q. What was the purpose of his driving that pass truck into Klamath that night?

“A. His purpose was to transport the rest of the boys stationed there into the town for entertainment, movies, etc.

“Q. Do you know how many passengers he carried that evening? A. I don't know.

“Q. Do you know, of your own knowledge, whether Sergeant Brander had any other authority to use the pass truck for any other purpose or purposes on July 12, 1945?

“A. Will you repeat that?

Then, Mr. Friedman said:

“Will you read that back, please?” [31]

—addressing the Notary, and the question referred to was read by the Notary as follows:

“Q. Do you know, of your own knowledge, whether Sergeant Brander had any other authority to use the pass truck for any other purpose or purposes on July 12, 1945?

“A. No, he had no authority.”

If the Court please, I would move at this time that that question and answer be stricken as a conclusion of the witness as to whether the driver had authority. I believe the facts are to be presented rather than the conclusion of the witness.

The Court: Oh, strictly speaking, that is true; yes.

Mr. Thompson: I object, your Honor, to striking it.

The Court: It was told him.

(Deposition of Richard Francis Simon.)

Mr. Harrington: He might say what his instructions were, what he had been told to do.

The Court: What he had been told to do and what he had been doing—a chance to prove to his superiors. All right, proceed.

Mr. Harrington (Reading):

“Q. Was Sergeant Brander to remain with the truck at all times during that evening while in Klamath?

“A. No; he was free to seek his own entertainment, and then to drive the boys back to the camp in the evening about 10:00 to 11:00 o'clock.

“Q. When you say he was ‘free to seek his own entertainment,’ was he also free to use that pass truck during that evening? A. No.”

I move at this time that that question and answer be stricken.

The Court: Well, if you are referring to these objections, I would suggest that you take another deposition and get the facts. If you are going to stand on the objections that these are conclusions, I would want these statements and what the facts were, at least, so that I could draw the conclusion.

Mr. Harrington: If the Court please, I think the deposition as read will clearly disclose the facts; and the deposition was taken by the defendant, and I am reading into the record the defendant's questions in the defendant's deposition.

The Court: Well, that is very well; but if the objections are made and they are good, I sustain them; and the perfect testimony isn't before the

(Deposition of Richard Francis Simon.)

Court, and I want it to be here in some satisfactory and appropriate manner.

Mr. Harrington: Then——

The Court: It is stricken.

Mr. Harrington: If the Court please, I do want to avoid the necessity of taking another deposition.

The Court: Well, I am in a peculiar position in these tort cases; and although the United States Government has consented to be sued, I do feel that the Judge on the bench should [33] have presented to him all available facts.

Mr. Thompson: May it please the Court, in regard to the last motion on the part of the plaintiff—"When you say he was 'free to seek his own entertainment,' was he also free to use that pass truck during that evening?"—the answer is "No." Well, the questions are being directed to his superior officer, and certainly his superior——

The Court: Nevertheless it is a conclusion.

Mr. Thompson: In that sense, it might be deemed a conclusion.

The Court: Recess.

(A recess was taken.)

The Court: Proceed.

Mr. Harrington: If the Court please, counsel will make no further objection to the questions as conclusions of the witness, but will reserve his remarks concerning them to the time of argument as to the strength.

The Court: That means also that you waive

(Deposition of Richard Francis Simon.)

those objections that you have heretofore made?

Mr. Harrington: Yes, your Honor.

The Court: Very well.

Mr. Harrington: If the Court please, I will omit the term "Question" and "Answer," and let my inflection govern it.

The Court: Very well. [34]

Mr. Harrington (Reading):

"Q. What was supposed to happen to the truck while they were seeking entertainment?

"A. Parked alongside a building in town, and left there until it was ready to come back.

"Q. Is that how far his authority went for the use of the pass truck? A. Yes.

"Q. Did you know any of the names of any other occupants of the pass truck that drove into Klamath with Sergeant Brander that evening?

"A. Well, I know one, that was Sergeant Lowell Warnik.

"Q. In your capacity of commanding officer, did you question Sergeant Brander and Sergeant Warnik in reference to the death of Mrs. Murphey?

"A. Sergeant Brander, I questioned him.

"Q. You questioned Sergeant Brander; during this questioning did he inform you whether the truck was used for any other purpose than originally designated by his authority?

"A. Well, yes; he used the truck to go to a shaker meeting.

(Deposition of Richard Francis Simon.)

“Q. Now, what do you mean by a ‘shaker meeting’?”

“A. That is the term they use in Klamath, California, for the meeting of the Indians; they call it a [35] shaker meeting.

“Q. And how far was this meeting from Klamath, California, in miles?

“A. It is in blocks, about two or three blocks.

“Q. About two or three blocks; that would be from the city of Klamath?

“A. I’ll say about five blocks.

“Q. Did Sergeant Brander drive the vehicle to that meeting?

“A. Why, yes; he started to, but he never got there.

“Q. Who accompanied him on the drive to the shaker meeting?

“A. Why, Sergeant Lowell Warnik and two women.

“Q. In questioning Sergeant Brander, did he tell you what caused him to drive to the meeting contrary to orders?

“A. Why, yes; he told me that Sergeant Warnik had suggested the use of the truck to go to the Shaker meeting.

“Q. Now, within your knowledge, did Sergeant Brander and Sergeant Warnik know that the truck should not have been used for that purpose?

“A. Yes.

“Q. Do you know, or were you told by Sergeant

(Deposition of Richard Francis Simon.)

Brander about what time they started for this shaker meeting? [36] A. I can't recall.

“Q. In the questioning of Sergeant Brander did he inform you how the accident occurred?

“A. Yes.

“Q. Will you explain to us how that accident occurred?

“A. Sergeant Brander told me that he had started to go to the shaker meeting, and to reach the shaker meeting it was necessary to go across the bridge which had no guard rails, and at the time he approached the bridge the shaker meeting was over, and the people attending the meeting had started to cross the bridge on foot at the other end, and as he drove over the bridge about half way or a little more than half way across, he heard people,—a commotion, people telling him to stop, so he stopped as soon as his wheels were off the bridge, and he went back to investigate and found that a person had fallen off the side of the bridge.

“Q. Did he inform you whether he struck this person, the motor vehicle struck this person; or how did it occur?

“A. He was positive he did not strike anyone. He told me the motor vehicle did not strike that person.

“Q. How soon after the accident occurred were you informed as commanding officer of the station?

“A. I'll estimate 10 minutes, 10 minutes to the time I got there.

(Deposition of Richard Francis Simon.)

“Q. In other words, you were immediately notified and left for the scene of the accident?

“A. Yes.

“Q. When you arrived did you talk to any of the persons that viewed this accident; and possible witnesses? A. Yes.

“Q. Do you know the names of the persons whom you interviewed? A. No.

“Q. Did they make a statement giving you an explanation of how it occurred, if you recall?

“A. I don't recall clear enough.

“Q. Was there an inquest conducted at the death of this woman, Mrs. Murphey?

“A. Yes, sir; there was a Coroner's inquest in Klamath, California.

“Q. And did you attend that inquest?

“A. Yes, sir.

“Q. Did you question any person or persons at the inquest?

“A. I questioned the daughter or daughter-in-law of the deceased during the Coroner's inquest.

“Q. What questions did you propound to her?

“A. I asked her on which side of her mother or mother-in-law she was walking towards the Army vehicle.

“Q. Any other questions?

“A. And I asked her, ‘Did the Army vehicle strike her’?

“Q. Do you recall her answer?

“A. To the first question she answered to the mother-in-law's, or mother's left; to the second question she answered, “No.”

(Deposition of Richard Francis Simon.)

“Q. You asked no other questions?

“A. No other questions.

“Q. Do you know what the Coroner’s finding was?

“A. Accidental death due to blinding lights of an Army vehicle.

“Q. After making your report did you turn in your report to your commanding officer?

“A. Yes; a copy of the Coroner’s inquest was also sent.

“Q. Now, Mr. Simon, did you at any time either prior to July 12, on July 12, or after July 12, 1945, give any authority to Sergeant Brander or any other Army personnel to operate this or any other Government vehicle except in the course of operation in connection with their duties for the United States Government? [39] A. No.

“Mr. Friedman: That’s all on that. Now for the record there was submitted to me, as the United States Attorney, interrogatories by Francis E. Harrington, Attorney-at-law, Cascade Building, Portland, Oregon, requesting that I, as Assistant United States Attorney conducting this deposition, read to Mr. Simon the interrogatories and to obtain a direct answer to each in order.

“This is a letter addressed to me on March 12, 1948, and received on March 15, 1948, and on behalf of Mr. Harrington I will now put the interrogatories to Mr. Simon.

“Q. Mr. Simon, I have here a group of interrogatories which are to be answered by you at the

(Deposition of Richard Francis Simon.)

request of Mr. Francis E. Harrington. The first is: 'If any part of the following statement is untrue, state the particular respects in which it is untrue. That your name is Richard F. Simon?'

"A. That's right.

"Q. 'You are a resident of Beaverdam, Ohio?'

"A. True.

"Q. 'You were on July 12, 1945, a Lieutenant in the Air Corps of the United States Army assigned to radar work?' [40]

"A. True.

"Q. 'On July 12, 1945, you were the commanding officer of a radar warning station operated by the United States Army at or in the vicinity of Klamath, California?' A. True.

"Q. 'That Paul F. Brander was on July 12, 1945, an enlisted man assigned to the said radar station and that he was subject to your command?'

"A. True.

"Q. 'That Lowell Warnik was a Sergeant in the Air Corps, United States Army, and assigned to the said radar station under your command on July 12, 1945?' A. True.

"Q. 'That on July 14, 1945, you attended an inquest into the death of one Huldah Murphey before Frank J. Blackerby, Coroner, at Klamath, Del Norte County, California, in your capacity as commanding officer of the radar warning station?'

"A. True.

"Q. 'That you questioned several of the witnesses who gave testimony at the inquest?'

(Deposition of Richard Francis Simon.)

“A. I just questioned one.

“Q. You merely questioned one witness, is that correct? A. Yes.

“Q. ‘That Sergeant Lowell Warnik was present at the [41] inquest but did not testify?’

“A. True.

“Q. ‘That Paul F. Brander testified at the inquest, that he was the driver of the Army carry-all, No. 2053411, which was involved in the accident resulting in the death of Huldah Murphey?’

“A. He was the driver, but I don’t recall the Army Truck number.

“Q. He was the driver of an Army carry-all, the number of which you do not remember, is that correct? A. That’s right.

“Q. ‘That the Army carry-all above-mentioned was assigned to and a part of the motor vehicle equipment of the radar station of which you were the commanding officer?’ A. True.

“Q. ‘That you are not now, and have not been since February 1, 1948, an officer or employee of the United States Government in any capacity whatsoever?’ A. No.

“Q. That is true? A. True.

“Q. Interrogatory No. 2: ‘Describe in detail the number of vehicles, giving type, size and carrying capacity assigned by the United States Army to official service at the radar station at Klamath, and which were or could be used to transport personnel on the public roads of California for five days before and after July 12, 1945.’

(Deposition of Richard Francis Simon.)

“A. I can’t recall the number, type, size and make of Army vehicles we had assigned to us, but I do remember they were used for transporting troops.

“Q. Interrogatory No. 3: ‘Describe the location of the radar station, giving the distance from the personnel quarters or barracks to—(a) the boundaries of the station.’

“A. I don’t feel as though I can answer that question.

“Q. Why?

“A. That is a matter of giving away information on radar sighting that was supposedly confidential.

“Q. Were you instructed that that was confidential while you were in the United States Army? A. Yes.

“Q. And at this time you do not care to disclose same without proper authority from the Army? A. From the Army, yes.

“Q. (3, cont’d): ‘The nearest public road.’

“A. U. S. Route 101.

“Q. (c): ‘The nearest major public highway.’

“A. Same.

“Q. (d): ‘The nearest boundary of the nearest town, village or settlement and the name of such place.’

“A. Three miles, the town of Klamath, California.

“Q. (e): ‘The center of such town, village or settlement.’

(Deposition of Richard Francis Simon.)

“A. Three miles and two blocks.

“Q. (f): ‘The nearest boundary or outskirts of the town of Klamath;’ that would be giving the distance from the personnel quarters to the nearest boundary of the outskirts of the town of Klamath?

“A. That would be three miles.

“Q. (g): ‘The center of the town of Klamath.’

“A. That would be three miles, and two or three blocks.

“Q. (h): ‘The tavern or restaurant in Klamath known as the “White Spot”.’

“A. I don’t recall any ‘White Spot,’ but there was a ‘Bright Spot,’ which was three miles and one block.

“Q. Interrogatory No. 4: ‘State whether a usual and customary duty assignment of Paul F. Brander during the month of June, 1945, and up to and including the 12th of July, 1945, was the driving of Army motor vehicles.

“A. His primary duty was the maintenance of radar [44] equipment, and he was also N.C.O. in charge of the camp in my absence, and an authorized driver of Army vehicles.”

At this point, I ask the Court to take note of the fact that “N.C.O.” means “Non-commissioned Officer.”

(Continuing reading.)

“Q. Interrogatory No. 5: ‘State whether, when the personnel of the radar station visited in Klamath in the evening, public carrier transportation

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was available, and if so, describe its frequency of service and the distances which had to be traversed on foot to make connections.'

"A. There was no public conveyance available.

"Q. Interrogatory No. 6: 'State the number and complement of the personnel at the radar station on July 12, 1945.'

"A. Unknown; but approximately 20.

"Q. Interrogatory No. 7: 'State how many of the personnel of the station were transported to Klamath by Paul Brander in the Army Carry-all on the night of July 12, 1945.'

"A. Unknown.

"Q. Interrogatory No. 8: 'State the number of times each U. S. Army personnel-carrying motor vehicle of the station was in the town of Klamath after 6:00 p.m. [45] during the month of June, 1945, and up to July 12, 1945.'

"A. Exactly, unknown. Estimated, once per night.

"Q. Interrogatory No. 9: 'State how many times the Army carry-all mentioned in question 1 was in the town of Klamath after 6:00 p.m. between June 1 and July 12, 1945.'

"A. Once per evening.

"Q. Interrogatory No. 10: 'State whether you or any other person took disciplinary action against

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Paul Brander on the ground and for the reason that he removed the Army carry-all from the limits of the radar station on July 12, 1945, in violation of any post or Army rule, regulation or order. If your answer is in the affirmative, give the exact wording of the charge against Brander, and the disposition of the charge or action.'

"A. I didn't take any action against Brander.

"Q. No action was taken against Mr. Brander for removing the Army vehicle from the Army station that evening the accident occurred?

"A. Higher authorities took action against him.

"Q. What action did you take?

"A. I took none.

"Mr. Friedman: That's all." [46]

Mr. Harrington: There follows the certificate of Herbert N. Archambault, a Notary Public, with respect to the taking of the deposition. It is the customary form.

The second deposition I will read into the record is the deposition of Paul W. Brander, taken on behalf of the defendant, before Simon A. Lubow, a Notary Public, of the State of New York, taken on April 5, 1948, at 4:00 o'clock, pursuant to notice and agreement.

The appearances were: Frank A. Crimi, of 50 Church Street, New York, of counsel for the plaintiff; and Nathan Skolnik, Assistant United States Attorney for the Southern District of New York, as attorney for the defendant.

(Reading.)

“PAUL W. BRANDER,

“a witness called on behalf of the defendant, being first duly sworn by the Notary Public, deposes and says as follows:

“Direct Examination

“By Mr. Skolnik:

“Q. Will you please state your full name and address?

“A. Paul William Brander, 2454 Webb Avenue, Bronx 63, New York.

“Q. On July 12, 1945, were you in the service?

“A. Yes.

“Q. What branch of the service were you in?

“A. The Army Air Corps.

“Q. What was your rank and where were you stationed [47] at that time?

“A. I was a staff sergeant and I was stationed about a mile and a half or two miles south of the town of Klamath.

“Q. Please tell us the number of your battalion or squadron or division, and the type of such division or squadron?

“A. It was the 411 Army Air Forces Bases Unit, also known as the San Francisco Control Group. I was in Company B.

“Q. And you were stationed near or at Klamath, California? A. That is correct.

“Q. How long had you been stationed at this particular base? A. About four months.

“Q. Prior to the accident? A. Yes.

“Q. Will you please tell me what your duties

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consisted of while you were at that particular base?

“A. I was the radar maintenance chief.

“Q. What was that?

“A. I was the radar maintenance chief.

“Q. Was the driving of an Army vehicle included among your duties? [48]

“A. No; because of the shorthandedness we had a few men there and everybody took turns driving a pass truck into town.”

I made a mistake in the reading. I would like to repeat the question and answer.

“Q. Was the driving of an Army vehicle included among your duties?

“A. No; because of the shorthandedness we only had a few men there, and everybody took turns driving a pass truck into town.

“Q. Was that for official purposes or also for private use?

“A. That was private use to get into town for recreation. We had no other means of getting into town.

“Q. But such driving of the truck was not used for official purposes, is that correct?

“The Witness: Excuse me?

“Mr. Skolnik: Repeat the question, please.

“Q. (Read.)

“A. Well, what do you mean by official purposes? You mean picking up rations in town or things of that nature?

“Q. For purposes of the Army, for official pur-

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poses as distinguished from leave purposes or private use.

“A. Well, that was leave purposes. [49]

“Q. Therefore I again ask you, was driving of this truck included among your official duties and purposes while you were stationed at Klamath?

“A. Only when I had to go to town to pick up rations; occasionally when there was no one else available to take the truck into town I drove it in.

“Q. When those occasions arose was it during the daytime or the evening?

“A. Those were only during the daylight hours.

“Q. Were there any orders outstanding prior to the date of the accident regarding the use of any Army vehicles during evening hours?

“A. No.

“Q. If you wanted to use an Army vehicle to go into town during your leave hours could you do so without asking anyone's permission or were you required to ask the permission of some officer?

“A. The truck went in each evening after the evening meal, and there was no permission asked, and usually the boy who got to the truck first drove it in.

“Does that answer your question?

“Q. Yes. Now, on the night of July 12, 1945, do you recall who had taken the truck from camp to go to town? A. Yes. [50]

“Q. Who was it? A. I did.

“Q. Did you ask for permission on that par-

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particular evening? A. No.

“Q. Did you take any other soldiers with you to town that evening? A. Yes.

“Q. How many men did you take with you?

“A. I believe there were about four of us.

“Q. About what time did you leave the camp?

“A. About nine o'clock.

“Q. 9:00 p.m.? A. Yes.

“Q. What kind of vehicle did you take to go to town?

“A. It was a half-ton vehicle known as a carry-all, somewhat similar to a station wagon.

“Q. And where were you headed for when you left camp? A. To Klamath.

“Q. Were you on leave at that particular time?

“A. Yes, I was off duty.

“Q. What was the purpose of your visit to Klamath? A. Recreation.

“Q. Will you please tell me what happened after you [51] left camp to go to Klamath?

“A. We got into town, parked the truck, and I walked around and then one sergeant came up to me, Sergeant Lowell Warneck, and asked me if I would drive him over to the Indian Shaker ceremonial dance. I agreed.

“Q. By the way, where was this?

“A. In Klamath. Then Sergeant Warneck got in the truck; we proceeded a short distance, and he saw two women that he had known, and he asked if I would not give them a lift as they were going over to the same place. They got on board and we

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proceeded. I asked Sergeant Warneck where this ceremonial dance was, and we had gotten a short distance along the highway when he told me to make a left turn, which I did. This road ended—that is, the public street ended at a farm——

“Q. At a farm you say?

“A. Yes, and we entered a small dirt road going to the farm, and as I made a short left turn I came upon a wooden bridge with some people coming towards me from the opposite direction.

“Mr. Crimi: People were coming towards you on the bridge?

“The Witness: Well, they were just starting to enter upon the bridge. [52]

“I proceeded to cross the bridge and kept to my right and passed the bridge and stopped about 50 yards beyond the end of the bridge, as I had come to a barn at which the Indian ceremonial dance was taking place.

“Q. What happened then?

“A. I stopped the vehicle and got out. A young woman came up to me and said that a woman had fallen off the bridge, that being my first indication of anything happening.

“Q. What did you do, if anything?

“A. I stood there stunned for a while, and then I walked down alongside the bridge down to the bottom to see what had happened. This elderly woman was lying on her back, and then I noticed one of our sergeants, Sergeant Eugene Wike, was there, and I requested that he go up and put another

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call in for the ambulance, and also to get the lieutenant who was in charge of our radar station.

“Q. And did an ambulance subsequently come?

“A. Not for several hours.

“Q. Was any doctor called at the time?

“A. There was no doctor available.

“Q. What was done for the woman, if anything?

“A. She was made comfortable by some of the neighbors [53] there by placing blankets under her as best they could.

“Q. Now coming back to the point where you mentioned you were approaching this bridge, will you please describe the type of bridge it was? Please describe the bridge, how long was it, how wide was it, and any other detail that you can recall about the bridge.

“A. I believe the bridge was was some 30 feet long with a width of about 11 foot——

“Mr. Crimi: Did you say 30 feet long? Did I get that right?

“The Witness: 30.

“A. (Continuing): ——with no railing.

“Q. Was it a wooden bridge or concrete?

“A. It was wooden.

“Q. As you approached this bridge do you know whether you had your headlights on?

“A. Yes.

“Q. How do you know?

“A. I had to; I couldn't see where to drive without them.

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“Q. Were you able to see the bridge well before entering upon the bridge?

“A. Not until I was within some 30 feet from it.

“Q. And when you reached this point of about 30 feet [54] from the bridge, did the light from your headlights give you sufficient lighting to see the bridge and to pass over it? A. Yes.

“Q. Where were you with relation to the entrance to the bridge, or how far away were you with relation to the entrance to the bridge when you first noticed these people coming towards you?

“A. I would say about 25 feet in front of me before I actually got upon the bridge.

“Q. How fast were you proceeding? How fast were you traveling at that particular point?

“A. About seven miles an hour.

“Q. How fast were you traveling when you got onto the bridge?

“A. I slowed down somewhat but I couldn't say the exact figure.

“Q. About what rate of speed were you traveling then?

“A. I would say I was going about a mile or a mile and a half less.

“Q. About what?

“A. About 5½ to 6 miles an hour.

“Q. And about what rate of speed were you actually crossing the bridge?

“A. About the same; about 6. [55]

“Q. Now, where were these people coming towards you when you first saw them? Were they

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on the bridge or were they approaching the entrance of the bridge?

“A. They were just about on the bridge.

“Q. How many people were there?

“A. Well, there were three in a group.

“Q. How were they walking, as a group, abreast of each other, or in what way?

“A. Well, they were walking along as a group. That is to say, one was leading, and they were quite close together, and as they came toward me they singled out into single file.

“Q. Where were they in relation to the bridge when they singled out, when they divided into single file?

“A. They were on the bridge, the beginning of the bridge.

“Q. What was that?

“A. The beginning of the bridge.

“Q. About how many feet had they walked on the bridge when they got into single file?

“A. They may have walked about three at the most, I think.

“Q. Three what?

“A. Three feet on the bridge.

“Q. Now will you please describe in detail exactly [56] what portion of the bridge your automobile passed over? In other words, were you passing over the center portion of the bridge to the right, the right portion of the bridge, or the left portion of the bridge?

“A. As I came upon the bridge I kept to my

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right at least—oh, within about six inches from the righthand side; that is, as I came on there I was slightly over to the right and as I saw these people coming I went over further and as I passed them I was six inches from the righthand side.

“Q. You mean the distance between the right end of your right side of your truck was approximately six inches from the right end of the bridge?

“A. That is right.

“Q. About how wide was your truck, do you know?

“A. I believe the truck measured something like 6 feet 2 inches in width.

“Q. In other words, you would say there was over 4 feet to your left? A. I believe so.

“Q. And did you continue moving along that path until you crossed the bridge?

“A. Yes, I did.

“Q. While crossing the bridge did you hear any sounds or outcries or noises of any kind from these people who were crossing the bridge in the opposite direction? A. No, I did not.

“Q. When for the first time did you know that a person had fallen off the bridge?

“A. When I stopped 50 yards beyond the bridge and this woman came up and told me so.

“Q. Do you know whether or not your truck struck this woman who fell off the bridge?

“A. I am sure the truck did not strike her.

“Q. Did you make a statement to any Army of-

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ficial for the Government regarding the said accident?

“A. Yes, the lieutenant took a statement from me.

“Q. What was his name?

“A. Lieutenant Richard Simon.

“Q. And did the statement that you gave to Lieutenant Simon contain substantially the same facts as you are now giving us at this deposition?

“A. Yes, sir.

“Q. Your trip to this Indian Shaker ceremony was in no way connected with your official Army business, is that correct?

“A. That is correct.

“Q. This visit was strictly a personal matter, a [58] pleasure trip on your behalf, is that correct?

“A. Yes.

“Q. Approximately what time did this accident occur? A. About 10 o'clock. 10 p.m.

“Q. Under existing Army regulations were you bound to return to the camp at any particular time?

“A. Yes, at midnight.

“Q. Do you know the names of the people who accompanied the woman who fell off the bridge at the time of the accident?

“A. I don't remember their names but I know one was a daughter and the other I heard was a son-in-law.

“Q. Will you please tell me in what order these people were passing the bridge; that is, who came first, who was second, and so forth?

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“A. I didn’t take particular notice of who came first but I believe the two women were preceding the man who was following them.

“Q. Do you know who was walking first?

“A. No, I did not observe them that closely.

“Q. In other words, you don’t know whether the deceased was walking first in line or whether it was the other woman who was walking first in line? A. No, I don’t. I can’t say.

“Q. Do you know how far apart these people were walking [59] while they were on the bridge, while they were passing the bridge?

“A. They were about two feet apart.

“Q. In other words, each person was two feet back of the other? A. That is correct.”

Mr. Skolnik at this point said:

“No further questions.

“Cross-Examination

“By Mr. Crimi:

“Q. Now, Mr. Brander, you say that on this particular night of June 12, 1945, you left the camp at about 9:00 p.m.?

“A. That is correct.

“Q. And went into Klamath, California, is that right? A. That is right.

“Q. And you say that four people were on the truck. Could you give us the names of the four people with you during the ride to Klamath?

“A. Sergeant Wike was one, and myself, and I don’t remember who the two others were.

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“Q. Was Sergeant Lowell Warneck one of the four? A. No.

“Q. In other words, you met Sergeant Warneck in Klamath?

“A. Yes; he had gone to town earlier. [60]

“Q. Now, you say there were no rules and regulations concerning the motor transportation from the camp to any nearby town, Klamath, or any other town?

“A. That was the only place we went to, was Klamath. However, if there was an occasional dance at any other town, we generally asked the lieutenant whether we could go.

“Q. You would then ask the lieutenant whether you could go?

“A. Yes. There would be mileage involved there.

“Q. Would you ask the lieutenant whether or not you could take a motor vehicle from the pool or otherwise, say a motor vehicle from the camp to the particular town?

“A. Are you referring to Klamath now?”

There was a discussion off the record.

“Q. Could you tell us whether or not at the time that you obtained permission from your superior officer to attend a dance at any other town, whether at the time you would also require permission as to the motor vehicle that you would use to get to that town from the camp?

“Mr. Skolnik: If you don't understand the question it can be read to you.

“The Witness: I understand the question, but

[(Deposition of Paul W. Brander.)]

I [61] don't know just how to answer it, because there were several other points that come in there."

There was a discussion off the record and the question was then read.

"Mr. Crimi: Please read the question."

The question was read.

"A. We always asked the lieutenant's permission to go to any town outside of Klamath.

"Q. But you did not have to ask permission as to the motor vehicle that you could use or would use for that particular occasion, did you?

"A. Well, that was the point I was just stressing.

"Q. Well, we want an answer on the record.

"A. No.

"Q. Now, Mr. Brander, you recall testifying at the inquest of the deceased woman, Huldah Murphey? A. I do.

"Q. And you recall testifying at the time in answer to a question saying that you had been requested to drive Sergeant Warneck over to the Shaker meeting, is that correct?

"A. That is correct.

"Q. Now who made that request?

"A. Sergeant Warneck.

"Q. Did you consider that an order at the time?

"A. No.

"Q. You did not? A. No.

"Q. Could you have refused Sergeant Warneck's request? A. Yes.

(Deposition of Paul W. Brander.)

“Q. Now you stated, Mr. Brander, that the bridge was 30 feet long; am I correct in that?

“A. I believe it was.

“Q. Did you hear the testimony of the highway policeman at the inquest? A. Yes, I did.

“Q. Do you recall whether or not the highway policeman was asked measurements as to the length of the bridge, the width, etc.?

“A. I don't remember. I believe he was asked the measurements of them, but what he stated them to be, I don't remember.

“Q. But you do recall that he testified that he had taken some measurements, is that right?

“A. That is correct.

“Q. If I were to state that the highway patrolman testified that the bridge was 113 feet long, would that in any way refresh your recollection, Mr. Brander?

“A. I may have understated the distance, but it is [63] hard for me to picture how long the bridge was now with all the time that has elapsed.

“Q. How wide would you say that this room was, according to your estimate?

“A. I would say it was about 15 feet.

“Mr. Crimi: Can we concede that?”

There was a discussion off the record.

“Mr. Skolnik: We will concede it is about 15 feet.

“Mr. Crimi: All right.

“Q. Would you say now, Mr. Brander, that the

(Deposition of Paul W. Brander.)

bridge, according to your estimation, was twice the length of this room? A. No.

“Q. Shorter or longer or what, can you tell us?

“A. It would be longer.

“Q. Would you say then that the figure of about 113 feet is more or less representative of the actual length of the bridge? A. Yes.

“Q. And as to the width, you said it was 11 feet? A. Yes.

“Q. If I were to state that the officer, the highway officer testified that the bridge upon measurement was actually 10 feet, would that be about right? A. Yes.

“Q. Now, Mr. Brander, about this bridge—was there something on the bridge to guide vehicles going across? Can you try to think back? Was there something on the bridge guiding vehicles going across?

“A. I believe there might have been planking on there.

“Q. Planking? A. Yes.

“Q. Could you tell us, more or less, how wide or how far apart these plankings were to the best of your memory?

“A. About the width of a normal tread of a car.

“Q. In feet how much would that be about?

“A. I would estimate it as being about 5½ feet.

“Q. 5½ feet apart?

“A. From center to center.

“Q. From center to center? A. Yes.

“Q. If I were to state that the California high-

(Deposition of Paul W. Brander.)

way patrolman said that this planking was 18 inches from each edge, would that be about correct, 18 inches from each edge of the bridge?

“A. It could be.

“Q. So that in driving across this bridge, Mr. Brander, you would have to keep within this planking, is that [65] right; you could not drive out of it; the planking would keep you according to the way it was laid out in the middle of the bridge?

“A. No.

“Q. It would not? A. It would not.

“Q. Well, if you got to the right side of the bridge, as you testified, you would have to jump the planking, is that right? A. That is right.

“Q. Did you jump the planking in this particular case? A. Yes.

“Q. How high is this planking or was this planking in inches or feet?

“A. Oh, I would say between an inch and a half or two inches at the most.

“Q. An inch and a half or two inches in height?

“A. Yes.

“Q. How wide was it, if you could tell us?

“A. It might have been a foot.

“Q. A foot wide? A. Yes.

“Q. And you say now that you went to the right of the bridge to avoid striking or hitting any person on the left side who happened to be there at the time? [66] A. That is right.

“Q. Now you testified today that you noticed three people on the bridge, is that right?

(Deposition of Paul W. Brander.)

"A. That was the group involved, yes.

"Q. The group involved? A. Yes.

"Q. But there were other people, is that it?

"A. Yes, there were others coming across.

"Q. How many others, about?

"A. I believe there were about four others.

"Q. About four others? A. Yes.

"Q. And that was a separate group, is that right? A. That is correct.

"Q. At the time of the inquest in answer to the very same question you said that you saw a group of five people across the bridge; would that refresh your recollection any? A. No.

"Q. You still maintain now that this group contained three people? A. At this date, yes.

"Q. On the night in question, July 12, 1945?

"A. Yes.

"Q. Would you say that the testimony you gave on [67] July 14, 1945, the day after or two days after the accident that you had seen five people in a group—would you say that that was not correct?

"A. No.

"Q. And is there a possibility that there were five people in that group? A. Yes.

"Q. And when for the first time did you see this group, and where were they in relation to the bridge?

"A. They were coming across on the lefthand side of the bridge.

"Q. Were they coming towards you or walking away from you?

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“A. They were coming towards me.

“Q. Towards you? A. Yes.

“Q. You were driving from Klamath towards the Shaker camp, is that right?

“A. That is correct.

“Q. Now, were they in the middle of the bridge, at the other end, or closer to your end as you went to the bridge?

“A. They were at the other end of the bridge.

“Q. The far end? [68]

“A. Yes, the end opposite.

“Q. Could you give us approximately how far they were from the end, the far end of the bridge?

“A. When I entered the bridge?

“Q. Yes.

“A. They were on the bridge but I don't remember exactly how far on the bridge they were.

“Q. Well, what would be your estimate today, Mr. Brander, in feet, if you can give it to us approximately? A. I would say about 10.

“Q. 10 feet? A. Yes.

“Q. 10 feet from where, can you tell us?

“A. From the beginning of the bridge at their end.

“Q. At the other end?

“A. That is right.

“Q. You would not say they were about the middle of the bridge, would you? A. No.

“Q. You heard the testimony of the witnesses at the inquest, did you not? A. Yes.

“Q. Do you recall the testimony approximately as to the position of this group at the time? [69]

(Deposition of Paul W. Brander.)

“A. I do not recall it now.

“Q. Can you say whether or not it was generally testified then that it was about the middle of the bridge, if you remember?

“Mr. Skolnik: If you remember.

“A. No, I don't remember what the testimony was here. It is so long ago.

“Q. Well, now, Mr. Brander, when and where were you with the truck on the bridge when you passed this group?

“A. I would say I was at about the center of the bridge at that time.

“Q. About the center of the bridge?

“A. Yes.

“Q. When you passed the group, is that it?

“A. Yes.

“Q. In other words, they were about 10 feet away from the far end of the bridge when you first saw them, right?

“Mr. Skolnik: You said when he entered the bridge.

“A. When I entered the bridge.

“Q. Yes, when you first saw the bridge, right?

“A. Yes.

“Q. And you passed about the middle of the bridge? A. Yes. [70]

“Q. Now you say you had the bright lights on at the time, is that right? A. Yes.

“Q. Did you turn the bright lights off at any time while you were going across the bridge?

(Deposition of Paul W. Brander.)

“A. No, because it was necessary to have them on to see where I was going.

“Q. You had them on at all times, is that right?

“A. Yes.

“Q. When you entered the bridge how fast were you going? A. About seven miles an hour.

“Q. When you passed the group in question how fast were you going?

“A. I would say about six.

“Q. About six?

“A. Yes; I slowed down slightly.

“Q. Did you at any time stop your vehicle on the bridge? A. No.

“Q. Just kept right on going, is that right?

“A. Yes.

“Q. Now could you tell us how far it is approximately from the camp to Klamath, California, in miles? Can you tell the distance? [71]

“A. Where our radar station was based, into town, you mean?

“Q. Yes.

“A. It was about a mile and a half or two miles, or maybe three.

“Mr. Skolnik: This distance you are giving now is from your camp to Klamath, is that what you mean?

“The Witness: Yes.

“Q. Now can you tell us what you did between 9 p.m. and 10 p.m. or 10:30 p.m. when this accident happened?

“A. I walked around the town and stopped in

(Deposition of Paul W. Brander.)

and had a drink, and it was while having a drink that Sergeant Warneck came up to me.

“Q. Where did you have the drink?

“A. At one of the bars in town.

“Q. Was it at the White Spot, or something like that?

“A. I think it was called the Bright Spot.”

Mr. Skolnik asks:

“Was it a bar or a restaurant?

“The Witness: It was a bar.

“Q. Sergeant Warneck came up to you at the bar or at this bar and grill? A. Yes.

“Q. The two women that were later in your car, in your carry-all, did you meet them at the bar?

“A. No.

“Q. Now, will you describe as best you can, Mr. Brander, where the two ladies sat in the carry-all when you gave them a lift to take them to the Shaker meeting?

“A. Sergeant Warneck sat next to me when we started out.

“Q. Next to the driver's seat, is that right?

“A. That is right. I believe he opened the door and he moved back into a back seat and one of the women set next to me, I believe, and the other one sat behind her.

“Q. The four of you were not crowded in the front cab or were not crowded in the seat next to you, or the driver's seat?

“A. No. There was a small folding seat next to the driver's.

(Deposition of Paul W. Brander.)

“Q. Now, what was the number of vehicles that were available at the camp on the day in question, July 12, 1945?

“A. There was a jeep, a carryall and a 2½-ton truck.

“Q. 2½-ton truck? A. Yes.

“Q. And what made up the personnel of the camp, [73] Mr. Brander? How many men?

“A. I would say approximately 20 men.

“Q. 20 men? A. Yes.

“Q. Did that include the officers and anyone else? A. The whole camp complement.

“Q. And you say the procedure or the custom followed was that anyone who could drive would take either the truck or carryall, or whatever was available to go into town, is that right?

“A. That is correct.

“Q. Now, had this been established by the supervising officer or the officer in charge of the camp that that procedure should be followed?

“A. No.

“Q. It had not? A. No.

“Q. Could you tell us how it came about that the procedure that you described was followed?

“A. I beg your pardon, I am getting a little confused here now.”

Mr. Skolnik interrupts.

“Who started that procedure?”

The Court: Well, we will interrupt and take the noon recess till 1:30. [74]

(A recess was taken until 1:30 p.m.)

(Deposition of Paul W. Brander.)

Afternoon Session—1:30 P.M.

The Court: Proceed. You may proceed.

Mr. Harrington: I believe there are a couple of questions that lead to the course of questioning that's being followed at this point, if I may repeat them for clarity.

The Court: All right.

Mr. Harrington (Reading):

"Q. And you say the procedure or the custom followed was that anyone who could drive would take either the truck or carryall, or whatever was available to go into town, is that right?

"A. That is correct.

"Q. Now, had this been established by the supervising officer or the officer in charge of the camp that that procedure should be followed?

"A. No.

"Q. It had not? A. No.

"Q. Could you tell us how it came about that the procedure that you described was followed?

"A. I beg your pardon, I am getting a little confused here now."

By Mr. Skolnik: [75]

"Who started that procedure?

"Q. How did it start?

"A. It was going on when I get up to the camp, and when it started I don't know.

"Q. It was going on when you got to the camp?

"A. That is right.

"Q. Did you ever hear of a dispatch or dispatch form, Mr. Brander? A. Yes.

(Deposition of Paul W. Brander.)

“Q. Was that dispatch form used at all at the camp?

“A. I don’t remember whether they used it at all. That is, I never signed one myself.

“Q. Did you have a dispatcher at the camp?

“A. No.

“Q. Could you tell us what is meant by a dispatch form? How was it used or what is it?

“A. I believe that is a form used to designate the driver and the vehicle at the time it leaves, and its destination.

“Q. And you say now that no dispatch forms were kept at the camp so far as you know?

“A. They might have been kept to check on the mileage, but I never saw any.

“Q. When you took a motor vehicle out whether on official business, or, as you say, after duty hours for leave purposes, did you have to mark your mileage? That is, mileage at leaving point and destination and returning point? A. No.

“Q. In other words, no record of any mileage was kept at the camp, is that it?

“A. There is a record kept of the mileage. How it was kept, I don’t know.

“Q. Well, how would a record be kept of them? I mean, how would there be a record in existence if someone did not report the mileage on the trucks or the particular vehicle?

“A. I believe the mileage was checked every day.

“Q. By whom?

(Deposition of Paul W. Brander.)

“A. By Sergeant Warneck. It was his duty to check the milage.

“Q. Was there a form of requisition used at the camp at any time so that a truck could be used or a motor vehicle could be taken out of camp for whatever purpose necessary?

“A. Not to my knowledge.

“Q. Not to your knowledge? A. No.

“Q. You never signed any requisition during the time you were in camp for any motor vehicle at any time? [77] A. No.

“Q. Was there any other means of conveyance from the camp to Klamath, California, or to any other nearby town especially, shall I say, public conveyance from the outside?

“A. Well, there was a Greyhound Bus Line that went through Klamath.

“Q. Went through Klamath? A. Yes.

“Q. But did this bus line go from Klamath to the camp? A. No.

“Q. I mean was there any means of transportation other than your own Army trucks or carry-all to get the men from the radar station to any nearby town? A. No.

“Q. Now, during the month of July, 1945, and up to and including July 12, Mr. Brander, how many times had you take a motor vehicle from the station, radar station, to Klamath or any other nearby town?

“A. From what date to what date?

“Q. From July 1st, the first 12 days in July.

(Deposition of Paul W. Brander.)

“A. I am afraid I don’t know.

“Q. Is that your answer? A. Yes.

“Q. Can you approximate in any way? Had you taken it [78] out before that July 12th date?

“A. Yes.

“Q. You had? A. Yes.

“Q. How soon before then, more or less?

“A. I believe I drove the 21½-ton truck into town that afternoon to pick up rations.

“Q. To pick up rations? A. Yes.

“Q. How many other times had you picked up rations, if you can tell us, in that month?

“A. It might have been about three times before that at most.

“Q. Had you driven the truck down to Klamath on any other evening prior to July 12th?

“A. Yes.

“Q. And approximately how many times you can’t tell, is that it? A. I can’t tell.

“Q. Had you driven any truck down during the month of June, 1945, the prior month?

“A. Yes.

“Q. How often would you say you had driven the trucks during that month?

“A. I can’t even estimate that. [79]

“Q. Would it be more than once a week?

“A. Yes.

“Q. It would? A. Yes.

“Q. Well now, how many men at the station that you know of could drive automobiles, motor vehicles?

(Deposition of Paul W. Brander.)

“A. I believe the majority could.

“Q. Well, will you tell us then how or what the custom of the camp was with respect to obtaining a car to go down to any town? How would you control the number of men or which man was going to take a car or a truck or any motor vehicle?

“The Witness: Please state that again.”

There was a discussion off the record, and there was a request that the question be read. The question was read.

“A. Well, whoever got through and was ready to go to town got out to the truck first and sat there until the others came along, and he drove into town.

“Q. Well, ordinarily would most of the men who would go into town go at one time in the same truck? A. Yes.

“Q. On the night in question, July 12, 1945, you say you drove four men into town?

“A. I believe I drove four men, yes.

“Q. Are the four the only men that went to town on [80] that particular night, as far as you know? A. No.

“Q. How would the others have gotten to town?

“A. Through use of private cars owned by some of the men at camp.

“Q. Had this carryall been in town prior to nine o'clock in the evening when you used it?

“A. No.

“Q. It had not? A. It had not.

“Q. What is the highest number of men that

(Deposition of Paul W. Brander.)

you carried on either the carryall or one of the other motor vehicles from the camp to the town?

“A. About six or seven at the most.

“Q. Six or seven? A. Yes.

“Q. And what arrangements were made for you men to go back to camp after the evening was over? Would you meet at one particular place, or how would you go about it?

“A. Well, we would meet where the carryall was parked until everybody got there, and everybody went back together unless they had other means of getting back or they were not going on duty that night.

“Q. Could you tell us the distance from the barracks [81] or the personnel quarters to the outside of this camp, Mr. Brander, approximately?

“A. That is kind of a hard question if you didn't know how the camp was laid out. Let me ask a question here: What do you consider the outside of the camp?

“Q. Well, the confines, whatever constitutes the actual outskirts of the camp, whether they had a fence there or not.”

By Mr. Skolnik:

“Do you mean the entrance to leave the camp?

“Mr. Crimi: Yes, to the entrance.

“Mr. Skolnik: Going to Klamath?

“A. Well, you would have to be there to understand what a peculiar situation it was. I am trying to figure it out. The camp area was set aside quite some distance away from the radar

(Deposition of Paul W. Brander.)

station itself, and what area of land the Government had leased, I don't know.

"Q. Was there a nearby road to this camp or across the camp or any other direction?

"A. There was a small dirt road that just passed the camp.

"Q. That just passed the camp?

"A. Yes. [82]

"Q. It went through the camp, did it?

"A. No.

"Q. And how far would that be from your barracks or headquarters to that dirt road?

"A. Oh, about 300, 400 feet.

"Q. Three or four hundred feet? A. Yes.

"Q. And Klamath was the nearest town to the camp? A. Yes.

"Q. Now, did part of the personnel of the camp go to town after six every night, or would there be certain specific nights during the week that was allowed?

"A. It was just the evenings that they were free from duty.

"Q. Would that happen every night with a group from the camp, be free from duty every night so that a car or one of the motor vehicles would go to camp every night? A. Yes.

"Q. And that would be after your tour of duty which terminated at what time? Was there any time fixed?

"A. Well, we ran crews of two on shifts of

(Deposition of Paul W. Brander.)

about eight hours, I believe, at a stretch, and then one crew came off about six in the evening.

“Q. About six in the evening? [83]

“A. Yes.

“Q. Now will you tell us, Mr. Brander, whether or not disciplinary proceedings were brought against you after July 12, 1945, by reason of this accident? A. Yes.

“Q. They were? A. Yes.

“Q. What was the nature of the charges brought against you? A. Misconduct.

“Q. Could you explain what was meant by misconduct? A. I don't know.

“Q. What was the result of the proceedings against you, if any?

“A. Reduction in grade.

“Q. Reduction in grade? A. Yes.

“Q. At the time of the accident, July 12, 1945, you were, I believe you testified, a staff sergeant?

“A. Yes, sir.

“Q. And when you were reduced in grade what was your reduction to? A. I was a private.

“Q. Was this reduction caused because of something you failed to do or did not do at the time of this [84] accident or the night in question?

“A. I don't know.

“Q. Weren't the charges explained to you at the time that the proceedings were brought against you? A. No.

“Q. Who brought the charges against you?

“A. I don't know who brought the charges

(Deposition of Paul W. Brander.)

against me. All I know is that a special bulletin came out which stated I am reduced to a grade of private for misconduct.

“Q. Who signed the special bulletin?

“A. I believe the commanding officer of the 411 Army Air Force Base Unit signed it.

“Q. And who was the commanding officer on July 12, 1945?

“A. Lieutenant Colonel Everett.

“Q. Weren't you reduced in rank, Mr. Brander, because you had failed to obtain permission for this vehicle that you were driving on the night in question, July 12, 1945? A. I don't know.

“Q. Could it have been for that reason?

“A. It might have.

“Q. Was a hearing given you with respect to these charges brought against you? [85]

“A. No.

“Q. So that the only thing that you know is that you read the bulletin and it informed you that you had been reduced in rank, is that correct? A. That is correct.

“Q. Can you tell us what infraction of the rules, if any, you might have been guilty of, if you were?

“A. It might have been the unauthorized use of the vehicle.

“Mr. Skolnik: What was that?”

His attorney says:

“Unauthorized use.

“Q. Well, when you say ‘unauthorized use’ was

(Deposition of Paul W. Brander.)

there a procedure that you had to follow before taking a motor vehicle out of the camp?

"A. Not to my knowledge.

"Q. Not to your knowledge? A. No.

"Q. Do you know if other members of the camp obtained permission whether in the form of a dispatch or requisition before they took a car or a motor vehicle outside of the camp?

"A. No. I believe they did not.

"Q. They did not, is that right?

"A. No. [86]

"Q. But you cannot now tell us whether one was required, as far as you know?

"A. I can't tell you whether it was required or not, no.

"Q. When were you discharged from the Army, Mr. Brander, honorably discharged or otherwise?

"A. On October 24, 1945.

"Q. Do you remember the number of the carry-all that was involved in this accident?

"A. No, I don't.

"Mr. Crimi: I think that is all."

Mr. Skolnik said:

"I have just this one question.

"Redirect Examination

"By Mr. Skolnik:

"Q. Mr. Brander, did you drive an Army vehicle into the town of Klamath on the day of the accident but prior to that particular evening?

"A. Yes.

(Deposition of Paul W. Brander.)

“Q. What was the purpose of that trip?

“A. To pick up rations.

“Q. When you drove into town to pick up rations were you at that time designated by someone to do so, or did you do so voluntarily?

“A. I believe it was voluntarily.

“Q. In other words, you were not acting under any [87] particular orders at that time, is that right? Is that correct, or am I wrong?

“A. No, you are correct. I believe I did it because Sergeant Warneck wanted to go to town in the afternoon and I dropped him off. He generally drove in to pick up rations.

“Q. Were you on any particular duty during that particular afternoon? A. No.

“Q. Were you off duty all that afternoon?

“A. I was free that afternoon.

“Q. Did you drive to Klamath on prior occasions to pick up rations?

“A. Yes, several times.

“Q. And at those other times did you also drive voluntarily or were you designated by someone at the camp to do so?

“A. I believe the lieutenant designated me one day to drive in for the rations.

“Q. You say on one day? A. Yes.

“Q. How about other times?

“A. I volunteered for the job to relieve Sergeant Warneck if he had something else pending.

“Q. In other words, was the matter of going to town [88] to pick up rations a matter of volun-

(Deposition of Paul W. Brander.)

teering to do so, or was that done in the regular manner and routine and by special designation of a superior officer?

“The Witness: Would you care to elaborate on that ‘regular manner’?”

There was an off-the-record discussion.

“A. It was voluntary on my part. However, I remember being told to pick up the rations by the lieutenant on one occasion.

“Q. Now coming down to the evening of July 12, 1945, when you drove the Army vehicle to Klamath, were you designated by someone to do so or did you do so voluntarily?

“A. I did so voluntarily.

“Q. Did the lieutenants at the camp or any other officer ever designate anyone in particular to drive the Army vehicles to Klamath on any particular evening?

“A. Prior to the accident I do not recall any such orders being given.

“Q. Can you tell me approximately how far was this barn where the **Shaker ceremony** was taking place in relation to the town of Klamath? By the way, is it a city or a town? [89]

“A. A town. It was on the outskirts. I would say it was approximately about three city blocks from the center of the town.

“Q. You say three city blocks: will you give me an idea of the type of blocks you have in mind?

“A. New York City blocks.

“Q. Well, we have short blocks and long ones.

(Deposition of Paul W. Brander.)

Are you familiar with 42nd Street and Fifth Avenue? A. Yes.

“Q. Are you referring to the short blocks each of which is about 200 or 215 feet long?

“A. That is correct.

“Q. Will you say this barn was in the center of the town of Klamath or outside of the town of Klamath?

“A. Actually I believe it comprised part of the town but it was on the fringe of the town.

“Mr. Skolnik: No further questions.

“Recross-Examination

“By Mr. Crimi:

“Q. Just one question: you say that some orders were given after the accident with respect to the handling or taking out of trucks?

“A. Yes.

“Q. Will you tell us what those orders were?

“A. I believe that certain men were specified to drive the trucks in on certain nights. [90]

“Q. I see. In other words, they designated a driver for the truck and the night that he was to drive? A. Yes.

“Q. Well, prior to that time your superior officer knew of the practice that any man would get to the truck first would drive the truck into town with the rest of the men, is that right? A. Yes.

“Q. That fact was known to the lieutenant in charge, was it? A. Yes.

“Q. It was known to Sergeant Warneck, your

(Deposition of Paul W. Brander.)

immediate superior or superior officer, is that right?

“A. Sergeant Warneck was not my superior.

“Q. He was not? A. No.

“Q. What would he be? Would have to take an order from him? A. No.

“Q. Well, it was known to Sergeant Warneck anyway? A. Yes.

“Q. Who was your immediate superior?

“A. Well, it was a tech sergeant whose name I don't remember and the lieutenant, the commander of the station. [91]

“Q. Lieutenant Simon, is that right?

“A. Yes.

“Q. And the tech sergeant also knew of the custom? A. Yes.

“Mr. Crimi: That is all.

“Mr. Skolnik: Just a few more questions.

“Redirect Examination

“By Mr. Skolnik:

“Q. When you say you were permitted to take an Army vehicle from the camp to the town of Klamath, was that permission only for the purpose of transporting fellow soldiers to Klamath? Is that correct? A. Yes.

“Q. Did such permission also include the use of that vehicle to any places outside of Klamath or for any other purpose than transportation to and from the camp?

“A. Yes. We used the vehicle to go short distances outside of Klamath.

“Q. To the knowledge of your superior officers?

[(Deposition of Paul W. Brander.)

“A. Yes.

“Q. And for what purpose were these trips made outside of Klamath?

“A. An invitation to dinner, for one.

“Q. And when you or any other member of your camp took such trip, was that with the knowledge of the [92] commanding officer at the camp?

“A. Yes.

“Q. And if the commanding officer had no such knowledge of such trip outside of Klamath, was it permitted?

“A. As far as I know, yes.

“Q. Even though the officer had no knowledge of any such use of the car, was it permitted?

“A. It was never denied us.

“Q. Well, when you it was never denied you, was it always done with consent and knowledge on the part of a superior officer? A. No.

“Q. How do you know whether or not it was never denied to you?

“A. Because on no occasion did the lieutenant forbid the use of a vehicle for any trip slightly outside of Klamath; that is, having knowledge of a trip previously made.

“Q. Is it not a fact that as a general rule anyone seeking to use an Army vehicle to go to some point beyond the town of Klamath would ask the superior officer for such permission?

“A. Well, if the point outside of Klamath involved a considerable distance. [93]

“Mr. Skolnik: No further questions.

(Deposition of Paul W. Brander.)

“Recross-Examination

“By Mr. Crimi:

“Q. What is the distance from the bar where you had stopped to the Shaker meeting?

“A. About three city blocks previously mentioned.

“Q. Was the Shaker meeting in the town of Klamath or outside?

“A. It was in the town of Klamath.

“Q. In other words, you would not have needed any special permission to drive the truck from the point at the bar to the place where the Shaker meeting was being held? A. No.

“Mr. Crimi: That is all.

“Discussion off the record,” and it was stipulated by and between the attorneys for the parties that all objections except as to the form of any questions put were reserved for the trial.

Follows, on my copy, the signature of Paul Brander.

[Endorsed]: Filed Feb. 15, 1949. [94]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, (or true and correct copies of orders entered on the minutes of this Court) in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties:

Amended complaint.

Answer to complaint.

Opinion and order.

Minutes of Court—August 3, 1948.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Statement of points upon which plaintiffs will rely on appeal.

Plaintiff's designation of record on appeal.

Defendant's designation of record on appeal.

Stipulation and order extending time in which to file and docket record on appeal.

Exhibit No. 1.

Reporter's transcript.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 16th day of February, A.D. 1949.

[Seal]

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12188. United States Court of Appeals for the Ninth Circuit. Marion J. Murphey, Elizabeth Irene Swartz, Marjorie Josephine Preskey and Robert Marion Murphey, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed February 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12188

MARION J. MURPHEY, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS INTEND TO RELY IN THIS
APPEAL AND APPELLANTS' DESIGNA-
TION OF RECORD ON APPEAL

I.

Appellants state that they will rely on the fol-
lowing points in taking this appeal:

1. That in deciding whether one Sergeant

Brander had permission or authority, express or implied, to operate a certain government motor vehicle at the time an accident occurred, the Trial Court erred in adopting naked opinion and naked conclusion testimony given by deposition as against detailed factual testimony on the same issue, also given by deposition.

2. That there is no substantial evidence in the record to support findings numbered 2, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Trial Court.

3. That the Trial Court exceeded the proper bounds of its discretion in requiring Plaintiffs-Appellants to permit the Trial Court to receive inadmissible and prejudicial evidence, afterward adopted by the Trial Court as the exact basis of its opinion, or be faced with an extended continuance of the trial of the cause.

4. That on the admissible evidence and on the weight of the credible evidence given by deposition the Trial Court erred in finding that Paul W. Brander had no authority to operate a certain motor vehicle at the time of an accident.

5. That on all the credible and admissible evidence the Trial Court erred in finding that Paul W. Brander was not acting in line of duty at the time of a certain accident.

6. That on all the evidence the Trial Court erred in not finding its verdict in favor of plaintiffs.

II.

Appellants hereby designate as the Record on Appeal herein the following:

1. That part of the reporter's transcript of the proceedings at the trial which includes the reading into the record of the depositions of Paul W. Brander and Richard F. Simon. No testimony of the witnesses Marion J. Murphey, Elizabeth M. Swartz or Harry Swartz is to be included.

2. The complaint as amended; the answer; the opinion of the Court; the findings and conclusions including the order directing entry of judgment; the judgment; the notice of appeal; and this statement of points and designation of the record on appeal; clerk's certificate.

By their attorney,

/s/ FRANCIS E. HARRINGTON,
Of Counsel for Appellants.

[Endorsed]: Filed February 28, 1949. Paul P. O'Brien, Clerk.

In the United States
COURT OF APPEALS
for the Ninth Circuit

MARION J. MURPHY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY and ROBERT MARION MURPHY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF

FRANCIS E. HARRINGTON,
WILLIAM B. WETHERALL,
Attorneys for Appellants.

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In the United States
COURT OF APPEALS
for the Ninth Circuit

MARION J. MURPHY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY and ROBERT MARION MURPHY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF

STATEMENT OF PLEADINGS,
JURISDICTION AND FACTS

Plaintiffs, heirs at law of Huldah Murphey, brought this action under the Federal Tort Claims Act (28 U.S.C. 921 et seq. prior to its codification and re-enactment as 28 U.S.C. 1291, 1346(b), 1402 (b), 1504, 2110, 2401(b), 2402, 2411, 2412(c) and 2671-2680*) to recover the pecuniary loss suffered by them resulting from her death.

*All references are to the 1946 codification, and for convenience we shall continue to refer to the statute as the Federal Tort Claims Act.

Section 377 of the Code of Civil Procedure of the State of California (See Record, p. 3) gives a right of action to the heirs at law against the tort feisor causing the death and against the employer responsible for his conduct. The complaint (Record, p. 2) alleged negligence by Paul Brander, Sergeant, United States Army, in the operation of an Army carryall truck as having caused the death, further alleging that at the time Brander was "acting in line of duty". The answer (Record, p. 7) was a general denial with a separate defense that Brander "was not at said time acting within the scope of his office or employment but to the contrary was operating said government vehicle contrary to authorization and direction".

The matter was heard at Sacramento, California, on June 1, 1948, before Honorable Dal M. Lemmon, District Judge, sitting without a jury. On August 3, 1948 he filed a written opinion (Record, p. 8) and ordered entry of judgment for the defendant. Findings of Fact and Conclusions of Law were made and entered (Record, p. 15), and a Judgment after Trial (Record, p. 20) was entered, both on September 21, 1948. Thereafter plaintiffs moved to amend the findings and conclusions and judgment, and moved for a new trial. Following denial of these motions, plaintiffs appealed to this Court within the time allowed by law (Record, p. 21).

The opinion of the trial court is printed in 79 Fed. Supp. 925.

Jurisdiction of the District Court arises from the Federal Tort Claims Act and jurisdiction of this Court

arises under 28 U.S. Code, section 225, to review the final judgment of the District Court.

At about 10:30 P.M. on July 12, 1945, while returning from a barn where she had witnessed an Indian Shaker dance ceremony, Mrs. Huldah Murphey was walking across Jimmy Jack Bridge in Klamath, Del Norte County, California, with her daughter and son-in-law. This wooden bridge was ten feet wide and had no guard rails. She was either struck or forced from the bridge to the gully below, the fall resulting in her death a few hours later, by an Army carryall truck driven by Sgt. Paul W. Brander. There is no dispute as to the circumstances of the accident and the District Judge in his opinion described Brander's negligence as gross and having been the proximate cause of the death.

In accordance with a custom at the Army Air Corps radar warning station about three miles from Klamath where he was one of a complement of about twenty men, Brander had driven the carryall into the town, with three or four soldiers as passengers, for an evening of recreation. A camp vehicle had been used for the same purpose every evening for more than four months prior to the date of July 12, 1945. Brander parked the carryall, walked about, had a drink at the "White Spot", and met one Sgt. Warneck who suggested attending the Shaker dance ceremony. On their way they picked up two young ladies who were walking to the barn. It was while crossing the bridge en route to the barn that the fatal accident occurred.

All of the evidence with respect to Brander's authority to operate the carryall came to the trial court through two depositions taken by and on behalf of the appellee and read into the record at the trial by counsel for appellants. The first is that of Lt. Richard Francis Simon, former commanding officer of the radar camp, taken in Toledo, Ohio on March 16, 1948, and printed in the Record at pages 23 to 39. The second is that of Sgt. Brander, taken in New York City on April 5, 1948, and printed in the Record at pages 40 to 77. Both men were then in civilian life. From the evidence thus submitted the trial court found that at the time of the accident Brander was without authority to use the carryall and was using it for his own personal use and business. It appears that the trial court adopted the deposition of Lt. Simon in toto in reaching his decision, and utterly rejected the deposition of Sgt. Brander. Appellants contend that the better, clearer and more complete evidence is in the deposition of Sgt. Brander.

QUESTION PRESENTED

The principal question presented herein is whether the District Judge erred in finding, from testimony submitted wholly by deposition, that the driver of the vehicle which killed Mrs. Huldah Murphey was not at the time of the accident acting in line of duty and was not acting within the scope of his office or employment.

SPECIFICATION OF ERRORS

The District Court erred:

1. In failing to find as a fact that Jimmy Jack Bridge and the barn which was Brander's destination were both within the town of Klamath.

2. In finding that the carryall was used under the direction and authority of the commanding officer of the radar station solely for the purpose of transporting the men when off duty to and from the town of Klamath.

3. In finding that the driver of the vehicle was directed to park the vehicle by the side of a building where it was required to remain until used to reconvey the men to the radar station.

4. In finding that special permission was required to go to any place other than Klamath in the vehicle, thereby inferentially finding that the destination of Brander on the trip involved was outside the town of Klamath.

5. In failing to find as a fact that the men at the radar station had general permission to use the carryall for general recreational and pleasure purposes in the vicinity of the town of Klamath when off duty in the evening.

6. In finding that Brander was not acting in line of duty and was not acting within the scope of his office or employment with the United States at the time of the accident.

7. In not finding a verdict in favor of plaintiffs-appellants.

NOTE: Proposed Findings of Fact and Conclusions of Law submitted by counsel for appellee were approved as to form by counsel for appellants. No notice was given to appellants that the findings and conclusions were substantially revised prior to being signed by the Trial Judge. As printed in the Record (pp. 16 to 19, inc.) there are only seven findings of fact whereas appellants, referring to the abandoned proposed findings in their statement of points upon which they intend to rely on appeal (Record, page 80) refer to numbers through fourteen. All reference herein will be to the findings as printed in the Record. Appellants approve findings 1, 2, 5 and 6 in full and challenge findings 3, 4 and 7 in whole or in part.

ARGUMENT

Part I

THE COURT OF APPEALS SHOULD REVIEW INDEPENDENTLY THE EVIDENCE SUBMITTED BY DEPOSITION TO THE TRIAL COURT AND UPON WHICH THE DECISION OF THE TRIAL COURT IS WHOLLY FOUNDED.

Appellants contend that when the sole evidence on a particular issue is presented to the trial court through depositions the appellate court is in as good position as the trial court was to appraise the evidence and has the burden of doing so. In such instance the findings of the trial court are entitled to slight weight and the appellate court should reach its conclusion independently from the trial court.

Equitable Life Assur. Soc. v. Irelan (1941) C.C.A. 9, 123 F. (2d) 462, 464.

Smith v. Royal Ins. Co. (1942) C.C.A. 9, 125 F. (2d) 222, 224, cert. den. 316 U.S. 695. 62 S. Ct. 1291, 86 L. Ed. 1765.

Stork Restaurant, Inc. v. Sahati, et al., (1948) C.C.A. 9, 166 F. (2d) 348.

In *Hummell Bros. Co. v. Serrick Corporation*, C.C.A. 7, 122 F. (2d) 740, the court at page 742 says of Rule 52A of the Federal Rules of Civil Procedure regarding the weight to be given to the findings of the lower court:

“We are of the opinion that it carries little, if any weight in the instant matter for the reasons (1) the findings relied upon appear to be conclusions of law rather than findings of fact, and (2) substantially all of the testimony in the case was taken by deposition and under those circumstances the court below was in no better position to judge of the credibility and the weight to be given to the witnesses than this court.”

Appellants will discuss the errors in the findings in the order in which they appear. As to *finding No. 3*:

A review of the testimony concerning the location of the bridge and of the barn in which the Indian Shaker dance ceremony was being held—Brander’s destination—discloses that finding No. 3 is in error in placing the bridge “in or near Klamath”, thereby implying a substantial trip in the carryall before the accident. Simon placed the barn as two to three to five blocks from Klamath (Record, p. 30). Brander placed the barn as three city blocks from the center of the town—about 600 to 645 feet (Record, pp. 73 and 74), as part of the town (Record, p. 74), as in the town of Klamath (Record, p. 77), and as fifty yards beyond the end of the bridge (Record, pp. 44 and 48). It therefore seems clear that the bridge and barn were within the town and only a short distance from its center.

As to *finding No. 4*:

In the last paragraph of finding No. 4 (Record, p. 17) it is stated that Brander " * * * was not acting in the line of duty and was not acting within the scope of his office or employment with the United States of America". Appellants contend that this is a conclusion of law not warranted by the testimony in the depositions and will discuss it in the light of the statements appearing in finding No. 7 (Record, pp. 18 and 19).

As to *finding No. 7*:

This is the catch-all finding which appellants contend is simply a paraphrase of the deposition of Lt. Simon and is as much in the nature of a conclusion of law as it is a finding of fact. Appellants challenge the finding generally as not being based upon the better and clearer evidence in the case.

The use of the carryall for pleasure was a permitted and contemplated use of the vehicle (Simon, Record, pp. 25 and 26), (Brander, Record, pp. 41, 42, 43, 51, 52, 61, 63, 66, 75 and 76). Brander had a permit to drive the carryall for pleasure purposes (Simon, Record, p. 25). In his opinion the trial judge commented that "The amusement of the men may be a part of defendant's business" and cited *Jacobus v. Brero*, 190 Cal. 375, in support of that statement (Record, p. 12). See also *Ackerson v. Erwin M. Jennings Co., Inc.*, 107 Conn. 393, 140 A. 760; *Conklin v. Kansas City Public Service Co.*, 41 S.W. (2d) 608.

The general question here raised is the relation of the armed forces' health and recreation program to the liability of the United States under the Federal Tort

Claims Act. Specifically the issue is whether the courts should declare the term in the Act "in line of duty" to be meaningless in reference to such program or whether it should encompass the broad program of off-duty activities of the armed services which has been found desirable to maintain our military and naval personnel at the highest peak of health, morale and efficiency.

The court should take judicial notice of the complete change of attitude toward military personnel which came about as we prepared for World War II. Our new servicemen were civilians, not career men in the military. Prior to their time there was little programming which did not relate specifically to the exact duties of the soldier, because the peace-time soldier for the most part led the life of a civilian. He had been regarded as a man with a job to whom there was little or no official responsibility when he was off duty. But with the advent of the new army came a new relationship to the government. The serviceman in war time, when this accident occurred, was away from his home surroundings, wearing a uniform which set him apart at all times, and the new government policy toward him became like a tent which covered him every moment. This was merely recognition of the fact that he was, by virtue of his enrollment, subject to military orders and discipline twenty-four hours per day. The military assumed control of him and his conduct, a situation directly shown in the instant case where despite clear evidence of gross negligence resulting in the death of a civilian, no action was taken by civilian authorities. Extensive schooling and training programs were established for the benefit

of the servicemen in fields apart from their military duties. But the greatest change came in the field of recreation.

The posters soliciting enlistments depicted the recreational and educational opportunities which flowed from military service. Swimming, dancing, ping-pong, baseball, football and sight-seeing were made inducements to enter the services, and indeed pursuance of them became a part of the program of the armed services for morale-building purposes. Such a program obviously contemplated the use of transportation facilities by the men in their off-duty hours and from that fact arose the custom of the men at the radar station at Klamath to use the carryall for general recreational purposes. It should be noted that the commanding officer at the station claimed power or authority in himself to permit the use of the carryall for pleasure or recreational purposes. The issue in the instant case is not, as the findings, opinion and judgment of the trial judge would indicate, whether Sgt. Brander had authority to operate the carryall for recreational and pleasure purposes, but rather whether at the time of the accident which caused the death of Mrs. Huldah Murphey he had so far departed from the generally permitted use of the vehicle as to make its use at the time an intervening cause or something done in pursuance of a private avocation or business.

In his deposition Lt. Simon affirmed the authority of Sgt. Brander to drive the carryall into Klamath for recreational purposes (Record, pp. 25 and 26). Simon's deposition is devoid of any statement as to the nature

and extent of the instructions under which Brander was to operate the vehicle. Asked what was "supposed to happen" to the truck while the men were seeking entertainment he said, "Parked alongside a building in town, and left there until it was ready to come back" (Record, p. 29). Counsel for appellants had objected to opinion and conclusion testimony from Simon, and the objections were sustained. However the trial court threatened a continuance of the trial if the objections stood, and counsel for appellants, faced with that prospect, withdrew and waived objections previously made and sustained, and made no further objections to testimony clearly inadmissible as opinion and conclusion testimony (Record, pp. 26 to 29).

The opinion and findings of the trial court reflect the flat opinion and conclusion statements of Simon, who does not say at any time what instructions were given or whether in fact any instructions were ever given. He does testify that operation was to be "under instructions of the commanding officer" (Record, p. 25). That ends his testimony as to the instructions without further definition of their nature and extent, whether oral or written, and the time they were made effective. There is no basis in the record for the question and answer on page 29 of the Record concerning use of the vehicle "for any other purpose than originally designated by—Brander's—authority". On page 30 of the Record Simon was asked whether Brander told him why he had driven to the meeting "contrary to orders". The appellate court should weigh this testimony in the light of the facts surrounding its admission into evidence.

Review of Sgt. Brander's deposition reveals direct and positive testimony to the following effect:

1. Brander had permission to operate the carryall for pleasure purposes (Record, pp. 41, 42 and 43).

2. Brander had been stationed at the radar camp for four months prior to July 12, 1945 (Record, p. 40), whereas Lt. Simon had been stationed there only one to two months prior to that date (Record, p. 24).

3. The procedure that the first competent driver to complete his duties for the day became the driver of the carryall into town for the evening was going on when Brander arrived at the camp (Record, p. 62).

4. There were no orders outstanding prior to the date of the accident regarding the use of Army vehicles during evening hours. No permission was required to take a vehicle to town in the evening (Record, p. 42).

5. Under the practice in effect with respect to use of the vehicles no special permission would have been required to drive the carryall on the trip to the barn, which was within the town of Klamath (Record, p. 77).

6. Permission to take the vehicle out of the camp in the evening included permission to go short distances outside of Klamath (Record, p. 75).

7. When camp personnel wanted to attend a function at any town other than Klamath they asked permission from the commanding officer to attend such function but did not have to ask for permission as to the motor vehicle to be used as a conveyance for the particular occasion (Record, p. 52).

8. The commanding officer of the camp knew that the vehicle was used to go on trips in the evening outside of Klamath, as to a dinner, without express permission therefor, and never forbade such a use of the vehicle after learning of such use (Record, p. 76).

9. Only if the contemplated trip in the evening involved considerable distance was it the general rule to ask for permission to use a vehicle for such a trip (Record, p. 76).

10. No dispatch or requisition forms were used or kept at the camp and no mileage accountability system was followed (Record, pp. 63 and 64).

It is submitted that on the better, clearer and more direct evidence in the deposition of Sgt. Brander, this court should reject the deposition of Lt. Simon, and find that at the time of the accident Sgt. Brander was operating the vehicle with the permission of the commanding officer of the camp at which he was assigned.

Part II

THE TRIAL COURT ERRED IN FAILING TO HOLD THAT THE DRIVER OF THE CARRYALL WAS IN LINE OF DUTY AT THE TIME OF THE ACCIDENT.

The pertinent provisions of the Federal Tort Claims Act are as follows:

“ * * * the district court * * * shall have * * * jurisdiction * * * to render judgment against the United States * * * on account of personal injury or death caused by the negligent or wrongful act or

omission of any employee of the Government while acting in the scope of his office or employment, under circumstances where the United States, if a private person, would be liable * * * in accordance with the law of the place where the act or omission occurred. 28 U.S.C. 931 (a).

“(b) ‘Employee of the Government’ includes officers or employees of any Federal Agency, members of the military or naval forces of the United States * * *.”

“(c) ‘Acting within the scope of his office or employment’, in the case of a member of the military or naval forces of the United States, means acting in line of duty.” 28 U.S.C. 941.

A statute must be construed so as to give meaning to every word, clause and sentence thereof.

Hellmich v. Hellman, 276 U.S. 233, 48 S. Ct. 244, 72 L. Ed. 544 (1928).

Washington Market Company v. Hoffman, 101 U.S. 112, 25 L. Ed. 782 (1879).

Ex parte Public Nat. Bank, 278 U.S. 101, 73 L. Ed. 202 (1928).

Congress recognized that the military and naval servicemen were in a different relationship to the government from ordinary employees of the other agencies by the very use of the term “in line of duty”. Had it employed the term “on duty” it would have been clear that the United States intended to be liable for negligence of servicemen and women only when the acts were within the scope of their actual duties. There is a clear distinction between the two terms (see discussion, post, of opinion of the trial court). But “in line of duty” is much broader than “scope of office or employment”. The latter term relates to work and duty exclusively

whereas the first includes not only the conceptions embodied in work and duty but adds to them a special circumstance of status.

It is unfortunate that principle consideration of the phrase "in line of duty" has been when the issue of the fault or negligence of a serviceman sufficed to deprive him of that status. To adopt interpretations of the phrase without careful consideration of all the facts and circumstances may be to deny the beneficial purpose of the Federal Tort Claims Act, which is to compensate third persons injured by such very negligence.

The phrase "in line of duty" is unexplained in the legislative history of the Federal Tort Claims Act.

"Tort Action Against the Government," Walter Gellhorn and C. Newton Schenck, 47 Col. L. R. 722, 727; and "The Federal Tort Claims Act," 56 Yale Law Journal, 534, 540, n. 41.

Various interpretations have been placed upon the phrase and it appears to be one whose meaning is adapted to the changed circumstances and conditions which require its application. Originally and principally it has been used to limit the conditions under which benefits were obtained as a consequence of service of the United States. As a result the usual guide to its meaning has been the opinion of the Attorney General of the United States. The following is a list of the principal opinions in which the phrase has been interpreted:

- 7 Op. Atty. Gen. 149 (1855)
- 7 Op. Atty. Gen. 161 (1855)
- 17 Op. Atty. Gen. 172 (1881)
- 32 Op. Atty. Gen. 12 (1919-21)
- 32 Op. Atty. Gen. 193 (1919-21)

35 Op. Atty. Gen. 506 (1925-29)

36 Op. Atty. Gen. 156 (1929-32)

36 Op. Atty. Gen. 442 (1929-32)

The issue in these opinions fell into two classes of cases, first, whether the conduct of the claimant was a cause or a condition of the injury for which compensation was asked, and second, whether the claimant was in a particular status at the time the injury was suffered. Eliminating the cases in which contributory negligence or fault of the party was the principal issue, it is submitted that the "status" cases support the contentions of the appellants. It must be obvious that to base liability of the United States under the Federal Tort Claims Act upon whether the agent of the United States was guilty of negligence is to make the Act meaningless.

In 32 Op. Atty. Gen. 193 five cases are considered. In the two instances in which the person were held not "in line of duty" the injury was held not to have any relation to the military status. Fault is considered in all five cases. But the application of a fault test to liability under the Act leads appellants to repeat that application of such a test automatically defeats the Act.

The judicial interpretations of the phrase "in line of duty" seem to be broader in general than the administrative ones. A narrow line of judicial opinion is exemplified by the case of *Rhodes v. United States*, 79 F. 740, C.C.A. 9, 1897, cited by the trial court in its opinion (Record, p. 14). The decision in the Rhodes case is based on the opinion of the Attorney General given in 1855 (7 Op. Atty. Gen. 149, 161), and requires that there be a causal relation, mediate or immediate, to the

duty required from the actor. The broader view is shown in the case of *Moore v. United States*, 48 Ct. Cl. 110, decided in 1913, in which the Rhodes case is not cited, and which declares that the serviceman is "in line of duty" until separated from the service by death or discharge, so long as he is submitting to military rules and regulations.

The Army and the Navy are concerned with the meaning of the phrase and have considered it officially many times. It seems that the Army adopts a more liberal interpretation than the Navy.

The Judge Advocate General of the Army submitted a lengthy analysis of the phrase "LINE OF DUTY" and the rule of construction applicable to it. As a preliminary he expressly disapproves the narrow construction placed on the term by the Navy. Terming the Moore case as warranting a broad interpretation he says, commenting on the difference in relation between the civilian to his employer and the soldier to his superiors,

"The reciprocal rights and duties of the employer and employee are within narrow limits of time, place and particular circumstances. The contact between the two is intermittent. The reciprocal rights and duties of the military authority and the soldier are as broad as human relations and are limited in time, place, or particular circumstances only by the military authority itself. The relation of a soldier to the military authority is a status in the highest degree confidential, because obedience to military orders is imperative, requiring, if necessary, the supreme sacrifice. The actual time and labor consumed in combatant hostile operations by the military establishment constitute but a small

fraction of the whole. To render combat operations effective preparatory and supporting work must be intense and under strict regulations. The ability of a military unit to maintain itself is dependent upon its texture. That ability comes only by the complete dedication of the soldier to the military service; asleep, he may be awakened; on leave or furlough, he may be called to his post; living, he may be sent to certain death. His whole life, those affairs that affect his body, his mind, his morals, and his happiness are of vital concern to the military success of the Army as a whole and are wholly subject to the order of the ultimate military authority.

"Bearing in mind that the soldier is always subject to military control and at all times bound to obey military orders, that furloughs are merely rest periods and part of the training of the soldier, the application of the principles enumerated by the courts in construing the workmen's compensation act will result in the following rules:

"(a) * * *

"(b) In determining whether the acts of a soldier within the period of his service are in line of duty, rules based on exact limits of time and place are not applicable. Here lies one of the distinct differences between a soldier and an employee. The status of employee continues, under ordinary circumstances, only while the employee is on the premises and during hours when engaged specifically upon the employer's business. Outside of such time and place the status ceases. The status of the soldier, on the other hand, is continuous in time and place.

"(c) Upon such basis alone, disability or death incurred during leave or furlough is not for that reason out of the line of duty. Leaves and furloughs have been determined to be a necessary element in the training of the Army. They are vital to its morals. * * *."

Opinions of the Judge Advocate General of the Army, Vol. 2, 1918, page 1006.

The Army has determined that persons engaged in recreation are "in line of duty" and the following opinions outline the Army view:

"An officer on duty status was killed while engaged in normal and proper recreation. The Pension Bureau refused his widow a pension. Query: Did the death occur in line of duty within the administrative determination of the War Department? The Pension Bureau interprets the words "death due to military service in line of duty", as they are used in the pension law, as admitting only deaths where an act of military duty is related to the death as an effective cause. *Congress itself has interpreted the words to refer only to the status of the deceased at time of death. The War Department adopts the latter construction and has consistently construed casualties as due to military service in line of duty wherever the person suffering them was on a duty status under competent orders and engaged in occupation or recreation proper and normal to persons in that status.*

"HELD, tested by this rule, that this casualty was due to military service in line of duty. It is unfortunate that the construction of this law is not consistent in both departments, but after careful consideration, this office can concede nothing of its own view of the meaning of these words. 42-520, Mar. 24, 1917." (Emphasis supplied)

Digest of Opinions of the Judge Advocate General, 1912-1940, p. 966.

"Encouragement of athletic pursuits as a part of the training of the Army has advanced by long strides during recent years. A soldier's physical as well as moral welfare are advanced thereby. Among athletic contests there is no game more encouraged as tending toward military training and proper mili-

tary spirit and the understanding of discipline than the game of football.

“HELD, that injuries received in athletic sports properly indulged in by officers and enlisted men while in camp or garrison are incurred in line of duty.

“HELD, further, that in view of the fact that football is a contest which requires return games, a soldier's status while engaged in such return game away from the reservation is as much that of line of duty as though he were playing on the parade ground of his own post.

“HELD, therefore that if he should be disabled in a duly authorized football game away from his reservation such disability would be in line of duty. C. 24398 Feb. 13, 1909.”

Digest of Opinions of the Judge Advocate General of the Army, Howland, 1912, p. 686.

One Pvt. Hughes was killed by a train as he walked across a railroad bridge “in pursuit of recreation”. He was at the time absent from his post on a 10-hour pass. He was found not to have been guilty of any negligence contributing to his death and it was held that he was in line of duty at the time of his death.

Opinions of the Judge Advocate General of the Army, vol. 1, 1917, p. 216.

In the present case Sgt. Brander was in off-duty status, neither on leave nor on a furlough. The court can take judicial notice of the fact that this is known as absence on a “pass”, which is simple permission to be off the post for a short period of time. The Army has declared that men in such status are “in line of duty” as a general rule.

"It is an essential incident in the operation of a 'pass' that the permission to be absent should not be for more than 24 hours, i.e., for such a length of time as to operate to remove the soldier from the possibility of being called for the performance of the more important duties for which he is expected to hold himself in constant readiness. Men on pass are thus not removed from the list of those who are 'present for duty' on the rolls.

"HELD, therefore, that to regard a man on pass as 'absent with leave' or 'on furlough' would work a serious injury in respect to the soldier who is in the immediate neighborhood of the post, and subject to call for duty if needed, and whose status therefore while on pass is, in the general case, *IN LINE OF DUTY*. C. 15600, Dec. 10, 1903; 2658, Oct. 16, 1896; 17202, Dec. 1, 1902; 23666, Sept. 21, 1909, and Sept. 8, 1910; 24393, May 7, June 1, and Oct. 3, 1910; 26949, June 23, 1910." (Emphasis supplied)

Digest of Opinions of the Judge Advocate General of the Army, Howland, 1912, p. 684.

The Navy has been relatively liberal in its interpretation of the phrase "in line of duty" as shown by the following:

"The following answer was made to a request for information concerning the Navy Department's policy with respect to line of duty status in ordinary cases of accidental drowning while on liberty, or while on leave: 'It is the view of the Navy Department that leave and liberty are given primarily for the purpose of recreation and relaxation. Any member of the naval service who meets his death while engaged in usual forms of recreation as in the case of accidental drowning while in swimming is considered to have died *IN LINE OF DUTY*, provided death did not result from his own misconduct. (C.M.O. 11, 1935, p. 10, C.M.O. 5, 1931, p. 25; C.M.O. 9, 1936, p. 19;' File: P2-5 (2)/A2-15

(370803), Oct. 28, 1937—J.A.G.).” (Emphasis supplied)

Compilation of Court Martial Orders, 1916-1937,
Vol. 2, C.M.O. No. 10-1937, p. 2179.

“An enlisted man, U. S. Navy, while riding on a motorcycle with a girl, collided with an automobile near Santa Monica, Calif., at 3:30 P.M. on June 11, 1931, as a result of which he died in the Santa Monica General Hospital at 10:05 p.m. on the same date. He was on authorized leave at the time of the accident.

“No court of inquiry, board of inquest, or board of investigation was held in this case. Information received from various sources, however, indicated that at the time of the accident this man was traveling at a fast rate of speed and crashed into a Cadillac car, the driver of which was making a left hand turn when struck by the motorcycle. The road at the scene of the collision was through a canyon and in the nature of a shallow S turn. At that place the driver of the automobile could not see the road behind him for a distance of one city block as houses which lined the left of the road as well as the sides of the cut would obstruct his vision. The commanding officer of the deceased stated that since the laws of California are very specific as to making U turns on highways, and from the limited information available he was of the opinion that the man's death was *IN LINE OF DUTY* and not due to his own misconduct.

“Held, that death in this case was not due to misconduct of the deceased (File: MM-Rath, Roy/P2-5 (2) (310701), Aug. 18, 1931).” (Emphasis supplied)

Compilation of Court Martial Orders, 1916-1937,
Vol. 2, p. 1640.

Cases almost similar in every point to the above in which the death or injury was held to have been re-

ceived "in line of duty" are found in Vol. 1, p. 223, C.M.O. 71-1918; Vol. 1, p. 794, C.M.O. 6-1922; and Vol. 2, p. 2096, C.M.O. 1-1937.

The Army and Navy have a definite responsibility in the administration of laws in which the phrase "in line of duty" plays an important part and this court should give careful consideration to their interpretation. It is a well settled rule of law that the construction placed upon words by those having control of their execution is entitled to considerable weight and will not be disregarded except for cogent reasons.

United States v. Jackson, 280 U.S. 183, 74 L. Ed. 361 (1930).

Brewster v. Gage, 280 U.S. 327, 74 L. Ed. 457 (1930).

It is therefore submitted that the foregoing interpretations made by the Army and the Navy should be adopted by this court.

The interpretations placed upon the phrase by state courts has usually been liberal. Thus, where an insurance policy denied benefits if death was "the result of military service", and the death occurred accidentally from a gun in the hands of a fellow soldier, and the insurance company refused to pay, pointing out that the death certificate read that death occurred "in line of duty", the court held that the phrase meant that the deceased was not violating any military law at the time.

Malone v. State Life Ins. Co., (1919) Mo., 213 S.W. 877.

Another case in which "in line of duty" was interpreted as meaning not in violation of any military

law, order or regulation is *Doke v. United Pacific Insurance Company*, 15 Wash. (2d) 536, 131 P. (2d) 436. There a member of the National Guard was killed while en route to the armory to attend a drill. It was held that he was "in line of duty" and his beneficiaries were paid.

In *Globe Indemnity Company, et al. v. Forrest*, 165 Va. 267, 182 S.E. 215 (1935), an action was brought against the compensation insurer of the state by a member of the Virginia National Guard to recover for injuries suffered while returning to camp from an evening's amusement at a beach resort. The court sustained the right to compensation, saying in its opinion:

"The relationship of master and servant was not broken when Forrest went to Virginia Beach on pass. This pass, or temporary leave of absence from his duties at the camp, was nothing more than a permission for him to absent himself for a few hours of recreation. During this period his employment continued for the reason that he was still in the character of a soldier and never dropped this character for one minute.

"The enlisted soldier, during his enlistment, and particularly during the active specific period of duty, never doffs the habiliments of his profession, to the extent of being beyond military orders and control. A pass granting temporary leave for recreational purposes cannot change this status any more than a leopard can change its spots. It would be de hors the principles of military science if it were otherwise."

To predicate a denial of recovery in the instant case upon disobedience of Brander to any supposed order of a superior officer would be to make absolute something

which is a matter of degree. The purpose of Brander's visit to Klamath was recreation and the carryall was given to him for recreational purposes. His status as "in line of duty" should be held to continue while he was engaged in recreational pursuits in accordance with the above decision.

The only instance in which "in line of duty" has been interpreted as meaning "in the prosecution of the business of the employer" is cited with approval by the trial court in its opinion (Record, p. 14). In that case, *LaBella v. Southwestern Bell Telephone Company*, 24 S.W. (2d) 1072 at 1075, the court distinguishes between acts done "within scope of employment" in contrast to acts done "in prosecuting the employers' business" or "in line of duty". Appellants submit that there is no support for this interpretation. It is submitted that the court in that case was confused between the meanings of the terms "on duty" and "in line of duty".

The trial court also cites *Collins v. Dollar S. S. Lines*, D.C.N.Y., 23 F. Supp. 395, wherein a civilian injured in a baseball game while enjoying recreation at Singapore was held not "in the service of the ship" at the time. In that case the vital elements that there was no military status and the employer offered no encouragement or support to the recreation appear. It is submitted that the case is not analogous.

Hutchins v. Covert, 39 Ind. App. 393, 78 N.E. 1061, is an instance in which a policeman who went berserk and shot several persons, thereafter committing suicide, was held not to have met his death "in line of duty". The

discussion of the basis of liability is so far apart from the present case as not to warrant further analysis. Nothing in the nature of the legislation involved in the instant case was being considered. At p. 388 of the state report the court says, "So far as we are advised, statutes of the United States granting pensions to disabled soldiers and seamen, and in the case of death, to widows, etc., are the only ones using the words, 'in the line of his duty'."

In the instant case appellants contend that recreation for the men at the radar camp was a part of the employer's business. In the Loper case is found a list of the principal California cases in which the issue of a departure from authority or permission in the use of an automobile is involved. In that case the court said,

"In each case the scope of employment and all relevant circumstances must be considered. * * * the factors (as listed in the cases) * * * are intent of the employee, nature, time and place of his conduct, his actual and implied authority, the work he was hired to do, *the incidental acts that the employer should reasonably have expected would be done and the amount of freedom allowed the employee in performing his duties.*" (Emphasis supplied)

Loper v. Morrison, (1944) 23 Cal. (2d) 600, 145 P. (2d) 1 at page 3.

Reviewing the testimony of Brander as to the freedom permitted the men at the camp in the use of the truck—and even considering that there may have been an order restricting the use of the truck when it was being used for recreation as Simon so weakly testified,

would it not be reasonable to expect the truck to be used within the town as Brander used it?

Two leading California cases in which an employer has been held liable for damages caused by the negligence of his employee in using his automobile—so-called “deviation” cases, are *Kruse v. White Brothers*, (1927) 81 Cal. App. 86 and *Loper v. Morrison* (supra). Although appellants feel that there is no deviation in the instant case, yet under the doctrine of the *Loper* case cited supra, the deviation must be held to have been reasonably anticipated when Brander was permitted to take the carryall for pleasure purposes.

Attention is called to a recent “deviation” case under the Federal Tort Claims Act where a driver who had taken a very substantial trip was held to have returned to duty although he was about four blocks from his proper location at the time of the accident.

Lowe v. United States, (1949) W.D. Mo. W.D. 83 F. Supp. 128.

SUMMARY

Appellants contend that the depositions, read together, disclose that extreme liberality was actually permitted in the use of the camp vehicles for pleasure purposes, and that there is no substantial evidence of the kind of limitations outlined in the opinion of the trial court. Both as a matter of fact and as a matter of law the evidence requires a finding that at the time of the

accident Sgt. Brander was "in line of duty" and the United States is liable to appellants.

Respectfully submitted,

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No. 12,188

IN THE

United States Court of Appeals
For the Ninth Circuit

MARION J. MURPHY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY and ROBERT MARION MURPHY,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

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Assistant United States Attorney,

Attorneys for Appellee.

FILED

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

MARION J. MURPHY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY and ROBERT MARION MURPHY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Appeal from a judgment and order made by the United States District Court for the Northern Division of the Northern District of California, after trial before the Court on an action filed under the provisions of the Federal Tort Claims Act. The Court on August 3, 1948, by the filing of a written opinion ordered that judgment be entered for the defendant, United States of America. Findings of Fact and Conclusions of Law were made and entered on September 21, 1948. Thereafter plaintiffs moved to amend the findings and conclusions and judgment and moved for a new trial. Upon denial of these motions plaintiffs perfected their present appeal.

JURISDICTION AND FACTS.

The appellants have fairly stated the matter of jurisdiction so far as the right to institute and maintain the present action is concerned and have correctly cited Section 377 of the Code of Civil Procedure of the State of California as giving a right of action to the heirs-at-law against the alleged tortfeasor.

The appellants have also, for the most part, correctly stated the circumstances under which the accident in question took place and although the Government did not admit negligence on the part of Sergeant Brander who was operating the Army truck, it did not purport to deny such negligence in so far as the occurrence of the accident and it will be presumed the facts presented were sufficient on which the Court may have found such negligence if it were an issue in the case.

The Government, on the other hand, takes issue with the statement of appellants that "the trial Court adopted the deposition of Lt. Simon *in toto* in reaching his decision, and utterly rejected the deposition of Sgt. Brander." In such respect it will be later pointed out that the deposition of Sgt. Brander equally supports the judgment of the trial Court and that there is every reason to believe it was fully relied upon in reaching such decision.

QUESTION PRESENTED.

The sole question presented here before this Circuit Court of Appeals is the determination of the question as to whether Sgt. Brander at the time of the accident was acting in the scope of his office or employment or in line of duty which later consideration is part and parcel of the former, acting in the scope of his office or employment.

APPELLANTS' ASSIGNMENT OF ERROR.

The appellants have assigned seven specific instances of error on the part of the trial Court but it is submitted that these specifications of error are all concerned with the sole consideration as set forth in the legal question presented. If the trial Court correctly determined that Sgt. Brander was not at the time of the accident acting within the scope of his office or employment, nor acting in line of duty there has then been no error committed by the trial Court.

ARGUMENT.

The appellants have properly stated that the Appellate Court is in as good a position as the trial Court to appraise the evidence which has been introduced by deposition and in this respect may make independent consideration of such evidence. It is of course submitted that such a consideration by this

tribunal will result in the same conclusion and decision as that reached by the trial Court.

It is also further submitted, however, that the decisions do accord some weight and import to the judgment reached by the trial Court in its judgment in the matter. This is only in accordance with good sense and sound reasoning, otherwise in the case of introduction of evidence by deposition it would follow that the trial in the first instance should have been before the Appellate Court rather than the trial Court. It will therefore be assumed that the trial judge in the instant case has given thorough consideration to the evidence presented and the law applying in the reaching of the final judgment entered.

The Government has admitted that the Army carryall truck operated by Sergeant Brander at the time of the accident in question was the property of the United States Government and has also admitted that Sgt. Brander was at such time a soldier in the United States Army and has, on the other hand, denied the claim that Sgt. Brander at the time of the accident was acting within the scope of his office or employment, or was acting in the line of duty. A conclusion in favor of the Government in this respect results in a denial of liability on the part of appellee for the accident resulting in the death of Mrs. Huldah Murphey.

An examination of the deposition of Lt. Simon who was the officer in charge of the United States Army camp at the time of the accident in question

discloses that personnel of the camp was permitted from time to time to drive Army vehicles into the town of Klamath as transportation for recreational purposes. This privilege was extended by Lt. Simon as officer in charge so as to enable such Army personnel to enjoy certain recreational facilities provided for in the town of Klamath. However, as stated by Lt. Simon the use of the Army trucks from time to time was not extended to any one particular soldier but was so provided for as to create a use resulting in a common benefit. In this respect it would be ridiculous to assume that Lt. Simon would have any authority to authorize such use for the personal enjoyment of any particular soldier. The United States Army could not by regulations or otherwise turn over Army vehicles to any soldier who at a particular time desired to use it for some personal venture. To so assume would be placing, to say the least, a considerable undue burden and hardship on the taxpayer as well as resulting in a most distorted construction of the language employed in the Federal Tort Claims Act. Consequently, although it is admitted that the United States of America did provide recreational activities for its members it was so provided for the common benefit of all and cannot be employed for the personal benefit or enjoyment of any one member. It then becomes clear that in the instant case the use of the Army truck was solely for the purpose of transporting the members or a group thereof of this particular radar camp to the

town of Klamath, which members after arriving at that point might enjoy their recreation in the town.

The following questions and answers set forth in the deposition of Lt. Simon discloses the matter of authority so far as the use of the Army truck on July 12, 1945, the date of the accident in question (R.T. pp. 31, 32, 35):

“Q. On the night of July 12, 1945, did Sergeant Brander have such authority to drive a pass truck into the town of Klamath?

A. Yes.

Q. What time did he leave the Camp for Klamath, if you know?

A. Unknown.

Q. Can you give us the approximate time?

A. Approximately 6:30 or 7:00 o'clock in the evening, which was usually the regular time they went in.

Q. What was the purpose of his driving that pass truck into Klamath that night?

A. His purpose was to transport the rest of the boys stationed there into the town for entertainment, movies, etc.

Q. Do you know how many passengers he carried that evening?

A. I don't know.

Q. Do you know, of your own knowledge, whether Sergeant Brander had any other authority to use the pass truck for any other purpose or purposes on July 12, 1945?

* * * * *

A. No, he had no authority.

* * * * *

Q. Was Sergeant Brander to remain with the truck at all times during that evening while in Klamath?

A. No: he was free to seek his own entertainment and then drive the boys back to the camp in the evening about 10:00 to 11:00 o'clock.

Q. When you say he was 'free to seek his own entertainment,' was he also free to use that pass truck during that evening?

A. No.

* * * * *

Q. What was supposed to happen to the truck while they were seeking entertainment?

A. Parked alongside a building in town, and left there until it was ready to come back.

Q. Is that how far his authority went for the use of the pass truck?

A. Yes."

There is no dispute in respect to the authority of Lt. Simon over the personnel and operation of the radar camp and it would appear from the testimony above set forth and also from other questions and answers set forth in the deposition of Lt. Simon that the use of the Army truck was to have been confined solely to the transportation from the camp to the town of Klamath and later that evening for the transportation of the Army personnel from the town of Klamath back again to the camp. Clearly there was no authority for the personal use of this truck by any one or more members of the camp as was done by Sgt. Brander and Sgt. Warneck who accompanied Sgt. Brander on their trip to the Shaker

meeting which was being held some distance from the center of town where the truck had been parked. As indicated the truck was to remain parked in town as had been the case in the past until the group as a whole was ready to return to camp.

An examination of the questions and answers contained in Sgt. Brander's deposition also clearly supports the conclusion that the operation of the Army carry-all at the time of the accident was outside "the scope of the office of employment" within the meaning of the language contained in the Federal Tort Claims Act. The answers of Sgt. Brander state in undeniable terms that he had no right to take the Army truck from the point where he had parked it in the town of Klamath and start on a personal venture with another member of the camp. It is disclosed that the habit in the past and one that was in conformity with directions was to park the carry-all in the town during the period of recreation enjoyed by the group and to leave such truck at that point where all of the members of such group would meet for their return to camp, and of course, even in the absence of such a specific direction, this would be the only sensible manner of operation. Otherwise, any members of such group going to the town might after reaching town take the Army truck for his own personal pleasure leaving the other members of the group with no transportation back to camp at the termination of the evening's recreation.

It is submitted that the following answers of Sgt. Brander fully support the statements made by Lt. Simon concerning the unauthorized use of the Army truck (R.T. p. 81):

“Q. What is the highest number of men that you carried on either the carryall or one of the other motor vehicles from the camp to the town?

A. About six or seven at the most.

Q. Six or seven?

A. Yes.

Q. And what arrangements were made for you men to go back to camp after the evening was over? Would you meet at one particular place, or how would you go about it?

A. Well, we would meet where the carry-all was parked until everybody got there, and everybody went back together unless they had other means of getting back or they were not going on duty that night.”

And again on page 86 of the Reporter's Transcript the following question and answer by Sgt. Brander discloses the unauthorized use of the Army truck:

“Q. Can you tell us what infraction of the rules, if any, you might have been guilty of, if you were?

A. It might have been the unauthorized use of the vehicle.”

Also, on page 92 of the Reporter's Transcript the following question and answer supporting the contention of the Government:

“Q. When you say you were permitted to take an Army vehicle from the camp to the town of Klamath, was that permission only for the purpose of transporting fellow soldiers to Klamath? Is that correct?

A. Yes.”

It is submitted that the deposition of Sgt. Brander fully supports the judgment and order of the trial Court in determining that at the time of the accident in question the operation of the Army truck by Sgt. Brander was an operation outside of the “scope of his office or employment” as a government employee operating such vehicle and that this same operation which was purely in connection with a personal pleasure trip of Sgt. Brander was also action not in line of duty within the terms and provisions of the Federal Tort Claims Act. Except for slight discrepancies the answers of Sgt. Brander by deposition are not in conflict with those contained in the deposition of Lt. Simon but to the contrary substantially support in substance Lt. Simon’s deposition which discloses an authorized use of the vehicle at the time of the accident and a use which prevents appellants from any right of recovery under the Federal Tort Claims Act.

There is no conflict in the decisions which deny recovery in the situation where the employee utilizes the employer’s vehicle for his own personal business or pleasure. A number of leading cases supporting that established rule of law are as follows:

Hanchett v. Wiseley, 107 Cal. App. 230;
Lane v. Bing, 202 Cal. 577;
Kish v. California S. Automobile Assn., 190
 Cal. 248;
Walters v. West. Am. Ins. Co., 4 Cal. App.
 (2d) 583;
Newman v. Steurernagel, 132 Cal. App. 417;
Weber v. Allen Co., 64 Cal. App. 274;
Grissim v. Blumenthal & Co., 76 Cal. App. 712;
Bourne v. North. Counties Title Ins. Co., 4
 Cal. App. (2d) 69.

Appellant seeks to place great importance on the distinction that he seeks to make in distinguishing between "scope of his office or employment" and "acting in line of duty" as applying to a member of the military or naval forces. However, it is respectfully submitted that insofar as the provisions of the Federal Tort Claims Act are concerned that proof of the fact that the employee was acting outside of the scope of his office or employment but to the contrary was pursuing solely a personal pleasure venture, *ipso facto*, takes such action or conduct on his part outside of the purview of action in line of duty. The cases cited by appellant in this regard all relate to conduct on the part of military and naval personnel which conduct or action was proven to be directly related in some manner to the duty owed by the actor to the employer, the United States Government. This is a necessary requisite in finding that the actor was in the line of duty even though such action or conduct at the time involved recreation or

pleasure. The outstanding decisions in support of the position of the Government in this respect are as follows:

La Bella v. Southwestern Bell Telephone Co.,
23 S.W. (2d) 1072;

Collins v. Dollar S. S. Lines, D.C.N.Y. 23 F.
Supp. 395;

Hutchens v. Covert, 78 N.E. 1061;

Rhodes v. United States, 79 F. 740.

It is respectfully submitted that the evidence presented in defense of the action in the instant case supports the sound conclusion that Sgt. Brander's operation of the truck at the time of the accident in question was wholly unauthorized either by direction or implication and that under the provisions of the Federal Tort Claims Act the appellants are barred from a recovery of damages as against the United States Government for the conduct of the employee. It cannot be denied that the use of the truck at the time in question was wholly and completely a personal use for pleasure on the part of Sgt. Brander and his passenger and it was never intended that there should be recourse as against the taxpayer for negligence committed by the Government employee under such circumstances. In order to support a right of recovery under circumstances such as presented in the instant case the evidence should be uncontradicted in support of the authority of the particular operation at the time, and as heretofore pointed out the uncontradicted evidence fully supports the unauthorized use.

CONCLUSION.

It is submitted that the judgment should be affirmed.

Dated, August 15, 1949.

Respectfully submitted,

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Assistant United States Attorney,

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No. 12189

United States
Court of Appeals

For the Ninth Circuit.

JACOB MORRIS DANZIGER,

Appellant,

vs.

ROBERT E. CLARK, United States Marshal,
Southern District of California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED
AUG 31 1909

PAUL P. O'BRIEN,
CLERK

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In the District Court of the United States, Southern
District of California, Central Division

No. 7808-P H—Civil

In the Matter of:

The Petition of Jacob Morris Danziger,
For a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Peirson M. Hall, Judge of the
United States District Court for the Southern
District of California, Central Division:

The petition of Jacob Morris Danziger respectfully shows: that he is imprisoned and restrained of his liberty by Robert E. Clark, United States Marshal for the Southern District of California, in the City of Los Angeles, State of California, and that the said petitioner is so confined and restrained, according to the best of your petitioner's knowledge and belief, pursuant to a judgment and commitment filed the 10th day of February, 1945, which said judgment was invoked by the spreading of a mandate issued in the United States Circuit Court of Appeals for the Ninth Circuit, dated October 20, 1947, and spread upon the minutes of this court on the 1st day of December, 1947, all of which appears in the records and files of this court in case No. 15, 173-Crim., United States of America vs. Jacob Morris Danziger, et al., to which reference is hereby had.

Your petitioner further states that he is advised

by counsel A. Brigham Rose, Esq., whose offices are located at 408 South Spring Street, Los Angeles 13, California, and so believes, that the said imprisonment of petitioner herein is illegal, and that said illegality consists in this, to-wit: your petitioner, together with several individual defendants and two corporate defendants, was accused in an indictment filed December 30, 1941, of the alleged commission of the following offenses:

A. Counts I to VII, inclusive, charge separate violations of Section 17(a) (1), Securities Act of 1933, 15 United States Code, Section 77q(a) (1).

B. Counts VIII to X, inclusive, charge separate violations of Section 5(a) (2), Securities Act of 1933, 15 United States Code, Section 77(e) (2). (Defendants were acquitted as to these four counts.)

C. Counts XII to XVI, inclusive, charge separate violations of Section 215, Criminal Code, 18 United States Code, Sec. 388 (Using Mails to Promote Fraud).

D. Count XVII charges a violation of Title 18, United States Code, Section 88, in that defendants in the Central Division of the Southern District of California conspired to commit offenses against the United States by violating the aforesaid statute; and that pursuant to said conspiracy, committed certain specified overt acts at Los Angeles, California. Each of the several counts of the indictment allege that the offenses therein charged were committed in the Central Division of the Southern District of California.

The said indictment was returned, as hereinbefore stated, on December 30, 1941, but none of the defendants were arraigned until December 11, 1944, at which time your petitioner and one defendant, named Willard E. Warren (indicted as Warren C. Carter) were brought into court and required to plead. Your petitioner presented a motion to quash the indictment. The motion was denied and exception allowed. Thereupon, the court set the date of trial for January 16, 1945.

In the interim, to-wit: on or about the 24th day of December, 1944, your petitioner herein applied for an alternative writ of mandate or prohibition to the United States Circuit Court of Appeals for the Ninth Circuit, seeking to abate the proposed trial of your petitioner, which petition was denied without opinion on the morning of January 16, 1945.

The said cause came on for trial on the said 16th day of January, 1945, before the Honorable Claude C. McColloch, District Judge, who was then presented with a motion for a continuance, predicated on two grounds: First that petitioner was awaiting the action of the United States Circuit Court of Appeals on his petition aforementioned; and, secondly, of more importance to the petitioner, that by reason of the circumstances herein, he was unable to procure witnesses in his behalf and important documents.

The said trial judge frankly acknowledged the seriousness of the showing and interposed that the

solution under the circumstances was to go ahead and see what developed; that the apparent difficulties of the defendants in proceeding to trial could be handled if he were sitting in his own jurisdiction, to-wit: in Oregon, but, since the Honorable Paul J. McCormick, presiding judge in this district, had set the case for trial for January 16, 1945, the proceedings against petitioner would go ahead, subject to later developments. All proceedings against the previously arraigned defendant Willard E. Warren were thereupon dismissed, which action was followed by the entry of a plea in behalf of the two corporate defendants of not guilty, although they were not represented or in court, and your petitioner's counsel herein mentioned was, over his protest and objection, appointed to represent the said two corporate defendants, subject to developments as the proceedings unfolded.

Your petitioner respectfully submits that these unprecedented judicial acts forced him to proceed without a trial by jury for the manifest reason that such tentative and unusual proceedings could not possibly be had if a jury were impaneled. Your petitioner was thus denied his fundamental right to trial by jury. The trial thereupon proceeded as against your petitioner and the two corporate defendants only.

Your petitioner during the trial made a motion to quash the indictment upon the grounds that "the same was procured contrary to the laws of the United States and in violation of constitutional

provisos, namely, due process, the equal protection of the law, and the statutes in cases concerning the subject of requisite evidence and character of evidence that is essentially required in order to vote an indictment against an accused and put him to trial." Decision on this motion was reserved and subsequently denied, with exception allowed to your petitioner.

Your petitioner particularly calls this court's attention to the fact that the record during the trial shows that the indictment was procured on hearsay, and it should especially be kept in mind that it was subsequently established by the proceedings had in the case of *Ballard vs. United States*, 91 L. ed., 195, that the Grand Jury which indicted your petitioner, as hereinbefore alleged, was improperly impaneled. However, the *Ballard* decision had not been rendered up to the time of the judgment imposed upon your petitioner herein.

Your petitioner further submits that throughout the trial he was denied the equal protection of the laws or due process. The evidence presented before the trial judge was in no instance sufficient to meet the legal requirements according to all of the established decisions governing courts of this jurisdiction. Your petitioner intends to establish this contention to a point of demonstration upon the hearing had pursuant to this application.

Your petitioner further submits that the right secured to him under the sixth amendment to the Constitution of the United States, namely, that an

accused shall be tried in the district where the offenses were committed, was denied to him by reason of the fact that the proofs offered at the trial respecting the alleged conspiracy pertained, if they did to any conspiracy, to a conspiracy involving transactions in New York and Wilmington, Delaware.

Your petitioner further submits that he was deprived of the undivided attention and services of his counsel by the action of the trial judge.

Your petitioner further submits, by the pronouncements made by the trial judge, that he was held to be answerable on the theory of agency for the acts of the said Willard E. Warren, against whom the evidence presented was not utilized, the proceedings having been dismissed against him respecting the various counts under which your petitioner was being tried. Petitioner can demonstrate at a hearing that everything pertaining to his trial was unfair and violated the due process provisions and the kind and character of trial guaranteed to an accused under the Constitution of the United States.

Your petitioner submits that he was found guilty on counts 1, 2, 3, 4, 5, 6, 12, 13, 14, 15, 16 and 17, as charged in the indictment. It was confessed by counsel for the Government that error existed in respect to count 15.

The opinion of the Circuit Court of Appeals was handed down on the 23rd day of April, 1947. It is officially reported in 161 F. (2d) 299.

Before the Circuit Court of Appeals there were 35 assignments of error and four additional points in the statement upon which petitioner relied on appeal. The opinion of the Circuit Court of Appeals failed to consider any but two of said points, and erroneously invoked 28 U. S. C. 395, and failed to commit itself as to any particular count of which petitioner was convicted, said opinion in a cursory manner merely indicating that your petitioner was guilty of some unspecified count. Incidentally, your Honor will note that the United States Circuit Court of Appeals reversed the conviction as to the two corporate defendants, but failed to reverse the conviction as to your petitioner, thus departing from the well established doctrine that where three persons are tried for a conspiracy and on the judgment it was nullified as to two, the third and singular person is entitled to a new trial.

Your petitioner submits that the applicability of the holding of *Ballard vs. United States*, 91 L. ed., 195, was not presented to the Circuit Court of Appeals in the original appeal, but was presented after the opinion was rendered by a supplement to the petition for rehearing. It was further established that the Circuit Court of Appeals at the time of its decision did not have before it the grounds presented for a continuance.

The petition for rehearing was filed on the 22nd day of May, 1947. Petition for rehearing was denied on July 8, 1947. Within the time provided by law your petitioner herein applied to the Su-

preme Court of the United States for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. This application was denied on or about the 13th day of October, 1947, without any opinion so far as your petitioner can ascertain.

Your petitioner submits that he has discovered since the proceedings hereinbefore had that the trial judge committed prejudicial and reversible error, he having gone on record that he had at the early stages of the trial, and before the defendant had offered any evidence in his behalf, reached a conclusion that he was proceeding with a trial as though the defendant had pleaded guilty. This is the first time in these proceedings that this all-important point has come to the knowledge and attention of your petitioner.

Your petitioner submits that at the time of his conviction the definitive rulings on the vital import of the questions of law preserved by the motions to quash by petitioner, and made during the trial, had not crystallized.

Petitioner, therefore, respectfully submits that the circumstances backgrounding and derogating the trial and the failure through no fault of petitioner to have vital and material matters presented to the Circuit Court of Appeals prior to the rendition of the decision, are exceptional, and under the authorities of the Supreme Court of the United States present proper grounds for relief through the remedy of a writ of habeas corpus.

Wherefore, your petitioner prays a writ of habeas

corpus to the end that he may be discharged from custody and the judgments and commitments under which he is held be nullified and declared void; that a time be fixed for hearing on his application so that this Honorable Court may make inquiry into the matters and things herein related, and that pending the action of this court on the within matters and proceedings he be admitted to bail.

/s/ JACOB MORRIS DANZIGER,
Petitioner.

/s/ A. BRIGHAM ROSE,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss:

Jacob Morris Danziger, being first duly sworn, deposes and says: that he is the petitioner named in the foregoing petition for a writ of habeas corpus; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge and belief except as to matters stated therein on information and belief, and as to those matters he believes it to be true.

/s/ JACOB MORRIS DANZIGER.

Subscribed and sworn to before me this 1st day of December, 1947.

[Seal] /s/ MAUD RICHARDSON,
Notary Public in and for the County of Los Angeles, State of California.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Petitioner was denied of his constitutional rights secured by Articles 5, 6, and 14 of the Constitution of the United States.

Constitution of the United States, Amendments to Articles 5, 6 and 14.

II. The motion to quash the indictment because petitioner was indicted by an illegally constituted Grand Jury was indicted on hearsay, should have been granted.

Ballard vs United States, 91 L. ed. 195.

Zap vs United States, 91 L. ed., 688.

III. The denial to petitioner of the undivided attention and services of his counsel, and the appointment over objection of petitioner's counsel to represent the two corporate codefendants tried for the conspiracy, violated the Bill of Rights.

Glasser vs United States,

315 U. S. 60, 86 L. ed. 681.

IV. Where a scheme alleged is of one kind and another is proved, the variance is fatal.

Beck vs United States,

145 F. 625.

V. Under the sixth amendment to the Constitution of the United States, the defendant must be

tried in the district where the offenses were committed.

Freeman vs United States,
20 F. (2d) 748.

VI. Where a judgment of conviction as to two or three defendants charged with conspiracy is set aside, it is incumbent to set it aside as to the singular or third of the defendants.

Fader vs United States,
257 F. 694.

Cofer vs United States,
37 F. (2d) 677.

VII. Where a trial and sentence of a Federal Court violated specific constitutional guarantees, a writ of habeas corpus will issue.

Callan vs Wilson,
127 U. S. 540;

Johnson vs Zerbst,
304 U. S. 458;

Bowen vs Johnson,
306 U. S. 19, 27.

ORDER

Upon reading and filing the within petition for a writ of habeas corpus, the clerk of this court is hereby directed to issue under the seal of this court a writ of habeas corpus, directed to the United States Marshal for the District herein, requiring

him to make a return thereto as required by law, on the 5th day of January, 1947, at the hour of ten o'clock A. M.

It is Further Ordered that pending the hearing and determination of the proceedings on habeas corpus herein presented, the petitioner, Jacob Morris Danziger, be admitted to bail upon the posting of a good and sufficient surety bond in the sum of Five Thousand Dollars (\$5,000.00).

Dated: Los Angeles, California, December 1st, 1947.

/s/ PEIRSON M. HALL,
District Judge.

Service Acknowledged Dec. 1947

[Endorsed]: Filed Dec. 1, 1947.

[Title of District Court and Cause.]

RETURN ON WRIT OF HABEAS CORPUS

I, Robert E. Clark, United States Marshal for the Southern District of California, respondent herein, for my return to said writ of habeas corpus in the above case state:

I.

That Jacob Morris Danziger, hereinafter referred to as the petitioner, is not being illegally restrained by me of his liberty, but that until released on bail by order of this Honorable Court was in my custody under proper and lawful authority.

II.

That on the 1st day of December, 1947, the petitioner surrendered to the custody of the United States Marshal under authority of a judgment of the District Court of the United States, Southern District of California, Central Division, and a commitment issued thereunder in that certain action theretofore litigated in the said District Court under the title United States of America v. Jacob Morris Danziger, et al., No. 15173-Criminal; that following the conviction of said Jacob Morris Danziger in said action, an appeal was taken by petitioner to the United States Circuit Court of Appeals for the Ninth Circuit; that said appeal was decided adversely to petitioner; that petitioner thereon petitioned the United States Supreme Court to issue its writ of certiorari for review of said conviction and that the Supreme Court of the United States denied petitioner's application for such writ of certiorari; that thereafter a mandate in usual and proper form duly issued in said action and on the 1st day of December, 1947, was spread upon the Minutes of this Honorable Court, whereon petitioner was committed to the respondent herein, the United States Marshal, for the execution of the judgment. A copy of said commitment is annexed hereto as Exhibit "A" and by this reference is incorporated herein and made a part hereof.

Wherefore, I, Robert E. Clark, United States Marshal for the Southern District of California, respectfully pray that the writ of habeas corpus

herein be dismissed, the bail thereon exonerated, and petitioner returned to the physical custody of the respondent.

ROBERT E. CLARK,

U. S. Marshal.

By /s/ RAYMOND A. RANSDELL,

Deputy U. S. Marshal.

State of California,

County of Los Angeles—ss.

Raymond A. Ransdell, being first duly sworn, deposes and says:

That he is the Deputy United States Marshal in charge of the office of the United States Marshal at times the United States Marshal personally is not present therein; that he makes the aforesaid return upon behalf of the United States Marshal and his Chief Deputy; that he has read the same and knows the contents thereof and that the same is true to the best of his knowledge and belief.

/s/ RAYMOND A. RANSDELL,

Subscribed and sworn to before me this 5th day of January, 1948.

[Seal] /s/ EDMUND L. SMITH,

Clerk of the U. S. District
Court.

EXHIBIT "A"

District Court of the United States, Southern District of California, Central Division

No. 15,173—Criminal

UNITED STATES

vs.

JACOB MORRIS DANZIGER

JUDGMENT AND COMMITMENT

In Secs. 17 counts for violation of Secs. 17 (a) (1) & 5(a) (2), Securities Act of 1933 (15 USC 77q(a) (1), e(a) (1); Sec. 37 of Crim. Code (18 USC 88); Sec. 215 of Crim. Code (18 USC 338).

On this 10th day of February, 1945, came the United States Attorney, and the defendant Jacob Morris Danziger appearing in proper person, and by counsel, A. Brigham Rose, Esq., and

The defendant having been convicted on finding of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: Counts 1 to 6, inc.: unlawfully using the US mails to employ a scheme and artifice to defraud, etc. 15 USC; Counts 12 to 16, inc.: unlawfully using the US mails in furtherance of the scheme and artifice to defraud, in violation of Title 18 USC 338); and Count 17: conspiring with others to commit the aforesaid acts in violation of Title 18 USC, Sec. 88; as more fully set forth in said counts of the indictment herein; and the defendant having been now asked whether

he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of fifteen (15) months on each of counts 1, 2, 3, 4, 5, 6, 12, 13, 14, 15, 16 and 17, concurrently (total term of imprisonment fifteen (15) months.

On each of count 7, 8, 9, 10 and 11, the Court finds the defendant not guilty.

It is Further Ordered that the defendant be forthwith remanded to custody of the U. S. Marshal.

It is Further Ordered that bond of the defendant be, and it hereby is, exonerated.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ CLAUDE McCULLOCH,

United States District Judge.

Filed this 10th day of February 1945.

/s/ EDMUND L. SMITH,

Clerk.

By /s/ E. N. FRANKENBERGER,

Deputy Clerk.

[Endorsed]: Filed January 5, 1948.

[Title of District Court and Cause.]

TRAVERSE TO RETURN TO WRIT OF
HABEAS CORPUS

The above named petitioner, Jacob Morris Danziger, in answer to the return of Robert E. Clark, United States Marshal for the Southern District of California, to the writ of habeas corpus, herein respectfully shows that the commitment returned by the said Robert E. Clark, United States Marshal as aforesaid, as the cause of your petitioner's detention, is void and of no effect and was issued in violation of your petitioner's rights, privileges and immunities under the Constitution and laws of the United States, for the following reasons:

I.

Your petitioner, as a citizen of the United States, under Article 5 of the Amendments to the Constitution of the United States, was by said constitutional proviso secured against being deprived of his liberty without due process of law.

II.

That pursuant to Article 6 of said Amendments to the Constitution your petitioner was entitled to enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, to be informed of the nature and the cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Your petitioner respectfully submits and alleges that, contrary to said constitutional provisos and safeguards, his commitment under a purported judgment of conviction was procured contrary to and more especially in direct violation of the spirit, essence and the terms of said constitutional safeguards, and in support of these contentions and assertions on his part petitioner submits the following contentions:

(a) That he was indicted by a grand jury on December 30, 1941, which grand jury was, under the authoritative Supreme Court decision of *Ballard vs. United States*, 91 L. ed. 195, so constituted that it could not return a valid indictment.

(b) That subsequent to the filing of said indictment, to-wit: at the time of trial, as your petitioner will disclose, his indictment had been procured solely on hearsay evidence.

(c) That, following the return of said indictment, notwithstanding that your petitioner at that time, and ever since the filing and return of said indictment, has been a resident of the state of California, county of Los Angeles, whose residence was known, respondent nevertheless failed to make any effort to arraign your petitioner prior to December of 1944.

(d) That the Government of the United States of America, without prior or proper notice, brought

your petitioner to trial on a charge of conspiracy on January 16, 1945, although at that time no other defendant, other than petitioner, had been arraigned on any charge pending against him, save and except a defendant named Warren (alias Carter, etc.), against whom all charges had been dismissed except one count, prior to the bringing to trial of your petitioner.

(e) That for the first time, to-wit: on said date of January 16, 1945, your petitioner was joined for trial with two corporate codefendants who had not been arraigned prior to said trial date, and who, incidentally, were not represented in court, even at the date of said arraignment, and that a trial for conspiracy was commenced on said date against these two corporate defendants and your petitioner. That your petitioner's counsel, over violent objection and protest, was by the trial judge directed to represent all three of said defendants, whose interests were adverse and conflicting. In this regard petitioner submits that the various exhibits and the various counts set forth in the indictment will and do reflect that the acts sought to be charged against this petitioner were the acts of the said corporate defendants.

(f) That petitioner, at the time he was thus suddenly forced into a trial after a delay of over three years, was deprived and denied the opportunity to have witnesses produced in his behalf; that his sworn affidavit for a continuance presenting this

situation was recognized by the trial judge and its importance confessed, but, nevertheless, petitioner's rights under Article 6 of the Amendments to the Constitution of the United States were denied provisionally.

(g) The record reflects that the trial judge confessed that the showing made by petitioner of his inability to proceed by reason of the sudden arraignment, after years of delay, was serious. However, nevertheless, the trial judge, by his declarations of record, led petitioner to believe that he, because he was an out-of-state judge, was disposed to appoint petitioner's counsel, over his objection, as attorney for these two corporations, subject to subsequent developments, and commence the trial on the charges contained in the indictment, with the reservations, until the evidence produced by the Government would indicate the necessity of a continuance and the taking of depositions of persons residing in European countries, at a time when our Government was in a state of war.

Petitioner, recognizing that a procedure along these lines could not validly be had with a jury, was thus, by the conduct of the trial judge, forced into a position of being required to waive trial by jury, which would not have been waived under other circumstances. Moreover, it is now revealed, by the declaration of the trial judge, made February 17, 1945, in open court in the absence of petitioner and his counsel, that the said trial judge was proceeding on the theory that the petitioner had indeed entered

a plea of guilty. We respectfully refer to the heretofore unknown judicial declarations, which appear of record to have been made February 17, 1945, and which are as follows: * * * it was so evident from an early state of the case, that I was practically dealing with a guilty plea by the defendant Danziger * * * the practical situation was that I had a defendant before me who was contesting a charge to which he had pleaded guilty, so conclusive were the admissions which had been drawn from him by Mr. Mainland during that examination and so obvious was the perjury the defendant was committing in attempting to explain away the uncontrovertible facts that the examination developed
* * * ”

Your petitioner submits that the said declarations of the trial judge manifestly reflect that he formulated an opinion before the evidence had been submitted in behalf of the defendant, and that the said trial judge, contrary to his judicial authority, had been accountable for divesting your petitioner (1) of his opportunity to produce witnesses in his behalf; (2) to afford him an opportunity to establish the bonafides of his activities; and (3) to have the issues of fact tried by an impartial jury.

(h) Your petitioner contends, and refers to the entire record evidence adduced in this case, that the same fails to show any semblance of a form of conspiracy in fact formulated or existing for which this petitioner would be called upon to be personally accountable or responsible. Your petitioner submits in this behalf that there is not a paucity of evidence,

or that, indeed, there is no evidence, that the Government cannot in good faith point to any portion of this record whatsoever to show that any legal evidence was adduced or presented which will support any charge contained in the indictment.

(i) The Government in the case of your petitioner has, contrary to the constitutional provisos and the statutes and law, sought to hold petitioner answerable for the machinations and acts of one Warren (Carter, etc.) against whom the Government dismissed 16 counts and whose own testimony shows that he even is not guilty of the count to which he pleaded guilty, to-wit: count 17.

(j) That in the purported trial of your petitioner, the Government sought to hold petitioner accountable for the acts of the said Warren (Carter, etc.) without the slightest pretense of establishing any foundation or presenting any legal proofs, or competent evidence. Contrary to fundamental principles of justice, the Government abandoned and dismissed the charges for the acts of Warren himself, and sought to, and have saddled upon your petitioner accountability for said unauthorized and unestablished agency. Your petitioner respectfully submits that the record evidence will itself unequivocally show that he is being held to account for the peccadillos of a person against whom the Government abandoned and dismissed its charges, and for which, contrary to fundamental legal principles, the **Government is seeking to imprison your petitioner**, not for any misfeasance or malfeasance on his part,

but for the acts of others with whom he was not in privity, or for whose conduct he is not in contemplation of law legally accountable.

(k) Your petitioner respectfully shows that in respect to his appeal taken to the United States Circuit Court of Appeals for the Ninth Circuit, said Circuit Court was not disposed to examine or consider all of the assignments of errors or the record evidence, that Government counsel has confessed error in count 15 of the indictment, which has not previously received any consideration and which confession strikes down count 17 of the indictment, which is the only count in which your petitioner was jointly tried with any defendant who stands convicted after trial or by plea. That your petitioner is prepared to show by the testimony of the Government witnesses itself that count 17 has not and cannot be sustained.

(l) That it was discovered after the opinion rendered by the Circuit Court that the Court and Government counsel at no time considered the merits of the application of petitioner for a continuance based on his inability under the circumstances to produce witnesses in his behalf in respect to vital and essential issues framed by the indictment.

(m) That the motion to quash the indictment on constitutional grounds that the grand jury was not properly constituted or qualified to return the indictment was not at the time of taking of the appeal by your petitioner herein crystallized by the subsequent decision rendered by the Supreme Court of

the United States as now established by the Ballard case.

(n) That petitioner submits that since the Circuit Court of Appeals reversed the conviction as to the two corporate defendants of your petitioner, under the doctrine enunciated in the case of *Feder vs. U. S.*, 257 Fed. 694, and *Cofer vs. U. S.*, 37 Fed. (2d) 677, a new trial should have been ordered as to your petitioner.

(o) Your petitioner submits that an examination of the record of the proceedings culminating in his conviction will show that he has never had the points raised by him adequately considered or passed upon.

(p) That your petitioner is the victim of arbitrary judicial conduct, and a fair and reasonable examination of the proceedings will reflect that no semblance of due process has been afforded him, to which record your petitioner now refers, with the same force and effect as if the said record were incorporated herein and set forth at length.

Wherefore, petitioner prays for an order discharging him from the custody of the said United States Marshal.

/s/ A. BRIGHAM ROSE,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss:

Jacob Morris Danziger, being first duly sworn, deposes and says: That he is the petitioner herein;

that he has read the foregoing Traverse to Return to Writ of Habeas Corpus, and knows the contents thereof, and that the same is in all respects true.

/s/ JACOB MORRIS DANZIGER.

Subscribed and sworn to before me this 12th day of January, 1948.

[Seal] /s/ MAUDE RICHARDSON,
Notary Public in and for the County of Los Angeles, State of California.

Service acknowledged January 12, 1948.

[Endorsed]: Filed January 12, 1948.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Peirson M. Hall, U. S. District Judge.

I have examined the transcript of record on appeal with particular reference to the assignment of errors on appeal. I have also examined the petitioner's brief and reply brief on appeal in the Circuit Court, the petition for rehearing, and supplement to petition for rehearing, and the briefs of both parties thereon, the petition for certiorari to the Supreme Court and the supplemental transcript of record filed therewith, as well as the supporting and opposing briefs thereon. And it appears, with one exception to be noted hereafter, that the matters and things raised in the petition for writ of habeas corpus, and at the hearing, and argument

and in the briefs were previously raised by petitioner in his appeal proceedings either in the Circuit Court or in the Supreme Court.

In the decision of the Circuit Court of Appeals (161 Fed. (2) 229) affirming petitioner's conviction, the court indicated it had considered all of the points and things raised by petitioner, but not specifically discussed in the opinion, and found no error.

The petition for rehearing was denied by the Circuit Court without opinion, as was the petition for certiorari by the Supreme Court. While it is true that mere denial of a petition for certiorari is not to be deemed an affirmance of all of the propositions of law which may have been stated or touched on in the lower court's opinion, I cannot agree with petitioner that such denial indicates no consideration of the matters and things covered in the petition. But I must on the contrary, hold that such denial was made upon appropriate judicial consideration, and is the law of the case as to all points raised in either or both the petition for rehearing and petition for certiorari.

Whatever the boundaries are of the power of a District Court under the writ of habeas corpus (See *Sunal vs. Large*, 332 U. S. 175, and its dissents, for a general discussion of the necessity of keeping such boundaries flexible) it cannot be said that there lies within such boundaries the power of a United States District Court to act as a reviewing court on a habeas corpus proceeding to both the Circuit Court of Appeals and the Supreme Court

on matters and things previously considered and decided by such Appellate Courts on appeal in a specific case. And that is what the petitioner here asks, with a view to getting a different result, which amounts to a request for a reversal by the District Court of both the Circuit Court of Appeals and the Supreme Court.

The new thing brought into these proceedings is a statement by the trial judge after the conclusion of the trial, and after the notice of appeal, to the general effect that it had become evident to him from an early stage of the trial that he was practically dealing with a "guilty plea" because of admissions of the defendant which had been reduced to writing, and introduced in evidence.

If such statement indicated error on the part of trial judge during the trial, surely the petitioner waived it when he did not either include it as an assignment of error, or even bother to print it in the record on appeal of which, incidentally, there were over 1800 printed pages, which would indicate that petitioner himself a lawyer, and his learned counsel, were not without assiduity and diligence, to say nothing of the petition for writ of prohibition, the appeal, the petition for rehearing, and the petition for certiorari. But even if it were not waived, I can see no violation of due process, or of any other constitutional provision or of law, so as to entitle the petitioner to a writ of habeas corpus. The statement was made after the trial had concluded, and judgment and sentence had been pro-

nounced, and after appeal had been taken. It was made on a hearing in connection with bail, and as I read the record, was merely a way of emphasizing the importance of the defendant's admissions in connection with the refusal of the trial judge to grant bail on appeal.

Something should also be said about the other points made by the petitioner, which I suggested should be discussed in the briefs and on arguments.

One was the asserted error of the trial judge to grant petitioner's motion for a continuance based on the affidavit of petitioner filed at the commencement of the trial and the contention that such asserted error was not ruled on by the higher courts, because such affidavit was not contained in the transcript of record before the Circuit Court of Appeals, although it was in the supplemental record before the Supreme Court.

It must be pointed out that the petitioner never asked for a continuance after the filing of the affidavit, either at the conclusion of the government's case, when all of its evidence had been disclosed to petitioner, or at any other time, on the ground that the name or location of any witness, or of any evidence, not then available to him, either in any foreign countries or elsewhere, might aid in his case.

Moreover, the petitioner did raise the point before the Circuit Court of Appeals. In his brief to the Circuit Court of Appeals appears the following (pp 84-85)

“Specifications of Error”

“Appellants rely upon each and every one of their 35 Assignments of Errors set forth at pages 175 to 377 of the printed Record, which are set out in the appendix herein, commencing at page 3 to and including page 100. In addition to the errors thus specified, appellants have also designated in their statement of points upon which they intend to rely (R. 1844-1846) the following:

“ ‘In addition to said assignment of errors, appellants herein urge the following additional points:

(2) Error in denying the motion of the defendant Jacob Morris Danziger for a continuance by reason of the inaccessability of material records in countries foreign to the United States involved in the transactions specified in the indictment and to the impossibility of production of witnesses residing in foreign countries whose testimony would be material to the defendants.’ ”

It was petitioner’s record. He made it. He was its architect and builder. He designated the things which it should contain. And if he did not think enough of the point, by putting his affidavit in support of it in the record, he cannot now have still another bite at the apple of judicial review by taking advantage of his own mistake in a habeas corpus proceeding.

It was also urged that petitioner was indicted by a Grand Jury upon which there were no women, and which accordingly was selected with “systematic and intentional exclusion” of some “economic,

social, religious, political, and geographical groups of the community," (*Thiel vs. Southern Pacific*, 338 U. S. 217), to wit, women (*Ballard vs. U. S.* 329, U. S. 187).

The petitioner's complaint is that the "definitive rulings" on this point had not "crystalized" within the ten days allowed to challenge the indictment from the date of the arraignment, allowed by Sec. 556 (a), Tit. 18 U. S. C., nor at any time before the decision of the Circuit Court of Appeals on his appeal.

Were this point before me *de novo*, I would be compelled to give heed to the fact that it had been raised in this District many times and had been considered settled for many years prior to the decision of the Supreme Court in the Ballard case, (a criminal case), that the exclusion of women from juries in the Federal Court in this District was no ground for challenging the legality of either a grand jury or a trial jury (see 35 Fed. Supp. 105, Oct. 8, 1940, and authorities there cited) and that to do so would be as futile as raising any one of hundreds of points raised before trial judges which have been settled by law and decision to the point where they are considered frivolous by the bench and bar, and that no authoritative precedent existed prior to the Ballard decision by the Supreme Court holding jury panels to be voted by the exclusion of women. (California decisions had been to the contrary) and that there has not been and is not now any written statute or rule, either Federal or State which specifically requires women not

to be excluded from jury selection, and that neither the Thiel case nor the Ballard case had been decided by the Supreme Court either at the time of the indictment, December 30, 1941, or within ten days from the date of arraignment of defendant, three years later, on the 20th of November, 1944. The Thiel case was not decided by the Supreme Court until May 20, 1946, (eighteen months after arraignment) nor the Ballard case until December, 1946, (over two years after petitioner's arraignment) nor the Zap case, (330 U. S. 800) until March 3, 1947, nor the Bell case (159 Fed. (2) 247) by the Circuit Court, until February 4, 1947.

In the Ballard, Bell, and Zap cases, the court held that the objection had been specifically raised within the ten day period of Sec. 556 (a) of Tit. 18; and in the Thiel case, that it was raised within the appropriate time for the objection to be made to the petit jury panel in civil cases.

The effect of these decisions is that if the point is not so specifically raised within the statutory time, it is waived. (See 329, U. S. at 190). It is held in this circuit by *Redman vs. Squier*, 162 Fed. (2) 195, that such failure to raise the point is a waiver.

But petitioner contends that he did not waive the point by failing to raise it within the required time, as he contends that the point was actually raised on his motion to quash, which was timely filed.

The motion to quash (record 68-69) did not specifically state his objection to the jury panel, and did not mention, even in a general way any asserted

violation of the due process clause or general non-compliance with the laws or statutes of the United States. But the motion was confined to the objection that the three year delay of arraignment was in violation of the Fifth Amendment, the Sixth Amendment, and the laws and statutes pertaining to arraignment.

While this may be so, from a literal reading of the motion, the petitioner, nevertheless, asserts that the general objection of violation of due process, and of the laws and statutes of the United States was raised by filing the motion, because in support of his motion to quash, he stated to the court in argument on the motion as follows: (R. p. 179.)

“I address to your Honor a motion to quash the indictment upon the grounds that the same was procured contrary to the laws of the United States, in violation of the constitutional provisos, namely, due process, the equal protections of the law and the statutes in cases concerning the subject of the requisite evidence and character of evidence that is essentially required in order to vote an indictment against an accused and put him to trial.”

As I read the above statement, it was not a general charge of denial of due process or a general charge of violation of the laws and statutes of the United States, so as to provide an umbrella for all specific questions which might thereafter be raised, even for the first time on argument on appeal to the Supreme Court, (such as occurred in *Mission vs. Utah*, U. S. Supreme Court, Oct. 1947 term, No. 60,

Feb. 8, 1948.). It rather appears to have been specifically and only a charge that the "requisite evidence and character of evidence that is essentially required in order to vote an indictment" was in violation of the due process clause, the Sixth Amendment and the laws and statutes of the United States in that particular only.

Whatever might be said for the proposition that a defendant and the lower courts should not be put to guessing as to what might be some day considered as error by the Supreme Court in an exercise of its "powers of supervision over the administration of justice in the Federal Courts" (328 U. S. 225; 329 U. S. 193) it must be conceded that neither the trial court nor the Circuit Court of Appeals could have guessed from the record and proceedings in the trial court that petitioner intended either his motion or the above statement in support thereof to be an objection to the grand jury panel.

Here it must be noted that while the petitioner is urging the invalidity of the grand jury panel as a constitutional question, the dissenting opinion of Justice Frankfurter in the Thiel case indicated that no constitutional question was involved (328 U. S. 227). And that in neither the Thiel case, nor the Ballard case majority opinion is there any indication that they held the jury panels to be invalid as being in violation of any constitutional right.

Petitioner relies upon the Thiel case and the Ballard case, so it is not clear, therefore, in precisely what fashion he claims due process was denied him in the selection of the jury panel, unless it be that

the Supreme Court having found the grand jury which indicted Ballard to be illegal, it is a denial of due process not to make the same holding as to petitioner, or that Section 556 (a) of Tit. 18 requiring such an attack to be made within ten days after arraignment is unconstitutional as being a denial of due process.

But in any event, the question as to the validity of a jury panel was specifically raised in the Circuit Court of Appeals on the petition for rehearing (see supplement to petition for rehearing filed in C. C. A. June 11, 1947), after the decision of the Supreme Court in the Ballard case. It was also raised in the petition for certiorari to the Supreme Court (petition page 17) and while both of these petitions were denied by the Circuit and Supreme Courts, without opinion, I must accept their denial as their conclusion that the point was not well taken, or had been waived by petitioner. And as indicated at the commencement of this memorandum, I cannot sit as a reviewing court of either the Circuit Court of Appeals or the Supreme Court.

The other point which was discussed at some length on argument, and in the briefs, was that petitioner was deprived of right of trial by jury. In face of the written waiver signed by both the petitioner and his counsel, the position of petitioner is a little vague and tenuous, to say the least.

No physical force or deceit is alleged to have been exercised or practiced upon either petitioner or his counsel. Nor is there said to have been any ignor-

ance on the part of petitioner or his counsel of his right to trial by jury. It seems to sum up to this: that petitioner, after the motion for continuance was denied, consulted with his counsel, and concluded that if it might become necessary for a continuance during the trial, he would fare better at the hands of the Judge, than at the hands of a jury, which might become separated during such continuance. The petitioner was not deprived of anything in this respect. He made a deliberate and consultative choice. He took a calculated risk, in which his counsel joined. If such a risk produced a result he did not expect or want, he cannot now be heard to complain that because the result was not to be expected, he was denied a constitutional right, and should be liberated on a writ of habeas corpus.

I have extended the within memorandum more than would be ordinarily necessary, but have done so in order that counsel might not be required to guess as to the basis of my rulings.

The writ is denied.

The petitioner is ordered remanded, and his bail is exonerated upon his delivery into custody.

Los Angeles, California, March 18, 1948.

[Endorsed]: Filed March 18, 1948.

[Title of District Court and Cause.]

ORDER DISCHARGING WRIT OF HABEAS
CORPUS AND REMANDING PETITION-
ER TO CUSTODY

Be It Remembered that the petition of Jacob Morris Danziger, petitioner herein, for a writ of habeas corpus, came on regularly to be heard in the above entitled Court on March 1, 1948, before Honorable Peirson M. Hall, Judge Presiding. Petitioner was personally present and represented by A. Brigham Rose, Esq., his attorney. Respondent, Robert E. Clark, United States Marshal for the Southern District of California, was represented by James M. Carter, United States Attorney, by Ernest A. Tolin, Chief Assistant United States Attorney. The Court having received evidence both oral and documentary and having heretofore made its Findings of Fact and Conclusions of Law:

It is Ordered, Adjudged and Decreed that the writ of habeas corpus heretofore issued herein be, and the same is, hereby discharged. Petitioner, Jacob Morris Danziger, is remanded to the custody of Respondent, Robert E. Clark, United States Marshal for the Southern District of California; and upon such delivery to such custody, his bail given herein shall be exonerated.

Dated this 8th day of July, 1948.

/s/ PEIRSON M. HALL,
U. S. District Judge.

[Endorsed]: Filed and entered July 9, 1948.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California, February 2, 1948

Appearances:

For the Government:

JAMES M. CARTER,

U. S. Attorney,

Los Angeles 12, California, by

ERNEST A. TOLIN,

Assistant U. S. Attorney.

For the Petitioner:

A. BRIGHAM ROSE, ESQ.,

408 South Spring Street,

Los Angeles 13, California. [1*]

* * *

The Court: I received the briefs that were filed in this matter, they were forwarded to me at Phoenix, and I had some time to read them.

It seemed to me that all of the points that you have raised—I will not say all of them; I will say most of them—were disposed of on the appeal.

Mr. Rose: Disposed of, your Honor, by failing to cite them.

The Court: The court said that all the other points were considered and there is nothing to them. There was, however, one point which you raised which was new and that was that the judge de-

* Page numbering appearing at bottom of page of original certified Transcript of Record.

clared from the bench that he was going to try the case as if the defendant had pleaded guilty. That is in substance.

Mr. Rose: He didn't make that observation from the [2] bench, he made it subsequently and I haven't introduced that yet. I want to introduce that. Here is the important——

The Court: Just a moment. That point was not involved on the appeal. It was not clear what the factual situation was in connection with it, and the matter was not, as I recall, discussed by the United States Attorneys in their briefs. I do not know whether they failed to do that because the factual situation was not clear to them or not.

The other point that seemed to me to be involved in connection with this matter was whether or not there had been a waiver by Danziger of his right to challenge the jury. The record in the Ballard case was not there available to me and I do not know whether it is available here. The record in this case was not there available to me when I had your briefs and I have not had an opportunity to look at it since.

Mr. Rose: The Ballard case, your Honor, was not decided at the time that this came up.

The Court: I know that. But the point is whether or not there was a waiver.

Now the Supreme Court's decision in the Ballard case stated that they made a motion to quash the indictment on the ground that it was in violation of whatever amendment they mentioned, the

Fifth Amendment or the Fourteenth Amendment, and because there were no women on the jury. They did not in their decision indicate which one of those they considered [3] it was a failure to waive. I suppose that specifically raising the point might have been considered in that case. But in any event, it is not clear in this case what the proceedings were.

Mr. Rose: May I ask your Honor if you have had an opportunity to read that transcript of the record?

The Court: No, I do not know where it is.

Mr. Rose: I filed it here.

The Court: It is here but it was not sent to me.

Mr. Rose: May I add this to it?

The Court: What is this, evidence?

Mr. Rose: It is a supplement to the record which was omitted when it went up to the Circuit Court of Appeals.

The Court: Have you seen it, Mr. Tolin?

Mr. Tolin: I have not seen it, your Honor.

Mr. Rose: That is the supplement to the record regarding the affidavit of continuance and your telegram stipulating that it may be added to the record after the decision.

The Court: What I have been saying has been preliminary to what I am about to say now. Neither of the parties briefed the question as to whether or not a general motion to dismiss on the denial of constitutional rights is sufficient to have raised the question that there were not women on the grand jury without specifically mentioning them. If that was your motion and if that is sufficient to have

raised the [4] question, then it would not be a waiver and neither the Supreme Court nor the Circuit Court of Appeals have indicated by their decisions what constitutes a waiver or what constitutes a failure to waive.

Mr. Rose: I will state this to your Honor, frankly, my personal view is that the broad grounds upon which I specifically presented the motion to quash in my opinion were comprehensive enough to reserve the point in view of the fact that the views of the Supreme Court on that specific objection had not yet crystallized and, frankly, I will tell your Honor in all candor why I didn't go into that matter in this brief is because I was personally impressed with your verdict in the Local 36 case, in which you reviewed the views of the Supreme Court in the Thiel case and in the Ballard case. and for that reason I felt that that subject might better be discussed so I could get your Honor's view on that.

The Court: I am giving you now the query that is in my mind which, as I say, was not discussed in either one of the parties' briefs, and that is, what constitutes a waiver.

Mr. Rose: Your Honor, there are two points that I consider are of vital importance and more in the nature of a denial of due process than anything else. There seems to have been confusion, as I pointed out perhaps not with particularity in my brief, they are confusing the mandate which requires the arraignment of a defendant promptly with the [5] failure of a defendant after he is ar-

raigned to take steps to expedite the trial on the merits.

The Court: Counsel, that point was squarely decided by the Circuit Court of Appeals.

Mr. Rose: No.

The Court: They said that the record was there and the Circuit Court of Appeals said that because he was not arraigned within three years' time, or whatever it was, that it was not the government's fault, that he could have gone up. I am not saying that I would have decided the case that way.

Mr. Rose: I do not believe they say because he was not arraigned, I think they say because he was not brought to trial. That is where I think the confusion arises.

The Court: You filed a petition for rehearing and you gave them a chance.

Counsel, if that question were initially before me and had not been decided by the Circuit Court of Appeals——

Mr. Rose: I don't think it has been decided, your Honor.

The Court: ——then it is quite likely that I would reach a different conclusion than they have reached, but I cannot sit here and review on a habeas corpus matter the decisions of the reviewing courts.

Mr. Rose: They are not binding on you. I will tell your Honor what I consider the two very important points [6] other than those that have been cursorily passed on here in this discussion. I believe that the conduct of the trial court in forcing

Danziger to waive trial by jury is a point that could be raised for the first time on habeas corpus. I have had occasion to raise that point in the State court by way of *coram nobis*.

The Court: But you raised that point.

Mr. Rose: But the court didn't pass on it.

The Court: Yes, it said all the other points are considered but they do not amount to anything.

Mr. Rose: I think they have violated the statutes of the United States because they can't dispose of issues in that manner.

The Court: They do all the time.

Mr. Rose: They haven't any jurisdiction nor any authority to do it. They must state that they have read the entire record.

The Court: But you have filed a petition for certiorari to the Supreme Court and they were the people to complain to, not to me.

Mr. Rose: The Supreme Court of the United States, as I have been informed, when they opened their October session denied every application for certiorari that was presented before them during that recess.

The Court: I do not think so. They granted that one [7] with regard to the Japanese land law and to others around the country.

Mr. Rose: Not any criminal proceedings.

The Court: I do not remember.

Mr. Rose: Of course I don't have to tell you that denial of certiorari by that court is to be regarded as equivalent to the fact that they even consider matters raised in the petition.

The Court: The Supreme Court has stated that denial of certiorari is not to be regarded as an affirmance of the opinion; it is merely a refusal to review it.

Mr. Rose: I take the view that the United States Supreme Court is not the forum before which matters such as are raised here should be saddled upon that court, with all of the business they have. I think that habeas corpus properly and invariably belongs in a trial court where a court can take evidence if necessary and where they have time to consider it.

The Court: You started out with the idea in suggesting that Mr. Danziger was sick and you were not ready to proceed.

Mr. Rose: Yes.

The Court: I interrupted you in an endeavor to give you an idea of the matters upon which I would like to have further briefs of counsel, and on only those two matters, unless you wish to add to your brief now concerning the distinction [8] between going to trial and failure to arraign.

Mr. Rose: What is your view, your Honor, on whether a Circuit Court has the authority to make an omnibus statement without passing on any of the points?

The Court: My view is immaterial because they do it anyhow.

Mr. Rose: But that doesn't divest your Honor of still affording a citizen the rights guaranteed to him under the Constitution.

The Court: If you were citing this case in con-

nection with and as authority for some other case, then I would be quite apt to disregard that statement. But in this case the Circuit Court's opinion is the law in that case and when they say that we must indulge the presumption that the judges of the Circuit Court have obeyed the law and if they are required by law to read all the briefs to pass upon it we must indulge the presumption that they have read and considered each one.

Mr. Rose: But I have it on record that they have no intention of reading the entire record, as Mr. Tolin suggested they do. And while my mind is in focus with that observation, I would like your Honor to keep in mind it is my intention in this proceeding that there is no evidence to support the charges contained in the indictment.

The Court: You contended that before the Circuit Court [9] of Appeals.

Mr. Rose: There is a difference between where you contend the evidence is insufficient and where you contend there is no evidence. I was very encouraged at the time I argued that matter up there. They allowed me twice the usual time, struck the government's brief, had us come back for argument again, and Mr. Justice Denman asked Mr. Tolin, he said, "I don't know about my associates here but as far as I am concerned I would like you to tell me what this so-called conspiracy was about, and between whom." That suggestion of Mr. Justice Denman's remains unanswered to date. [10]

Mr. Rose: May I file these as a supplement to the rest of the transcript?

The Court: They are filed.

Mr. Rose: If your Honor is going to read this transcript——

The Court: I do not know whether I am going to read that whole transcript or not. I am going to read enough of it to understand if I have an understanding of your points involved. I am going to review it to find out, if you will call my attention to it, what you claim was your motion to quash which preserved your constitutional right to have the indictment quashed because there were no women on the jury or grand jury.

In that connection, I think counsel for the United States Attorney should also treat of the proposition, which has been said so many times in connection with all kinds of [12] lawsuits, that the question as to the sufficiency of the indictment can be raised at any stage of the proceedings, and in this case it was not raised so that the Circuit Court of Appeals noticed it and it might have been raised but at least the first notice they took of it was after their decision and on the motion for a rehearing and subsequent to the decision of the Supreme Court in the Ballard case and before final judgment in this case, because the judgment does not become binding in this case on the appeal until the mandate comes down. Now, if he can raise the question as to the sufficiency of the indictment at any time before final judgment, I suppose he might even be

able to raise it here on a motion to spread the mandate. I do not know.

Mr. Tolin: Of course the mandate has been spread.

The Court: It has now, but that question was specifically raised before the mandate was spread.

Mr. Tolin: I wonder if your means by question the sufficiency of the indictment the question of the manner in which the indictment was obtained.

The Court: Yes. It is the same idea. [13]

* * *

The Court: I just want to see if counsel in these matters are ready and then I will get to them. Are you ready?

Mr. Rose: That depends upon your Honor's disposition. It occurs to me your Honor's disposition in that sense is good but what I had in mind was this, I have a few additional cases that have not heretofore been presented and I would like your Honor to consider them. Would it be all right for me to mention them this morning or would you like a memorandum?

The Court: I think that probably about now should be the time when we stop filing memoranda in this case.

Mr. Rose: Very well. Then there is one other matter. I have my alternative under the authorities of putting on oral evidence on one question here or I can present it by way of affidavit, whichever is preferable.

The Court: If you are referring to the remarks

of the [17] judge at the time of the trial, which you say for the first time is now being called to the attention of the court, and which are generally to the effect that he was trying the case as if it were a plea of guilty, I do not think there is any challenge to the fact that the record shows the judge made the statement. [18]

* * *

The Court: Let me get some dates in my mind. The indictment was returned when?

Mr. Rose: In '40 or '41.

The Court: I have the printed record here. It does not appear in it. The indictment is here but I do not see the date that it was filed.

Mr. Rose: That will be on the last page. It is '41, isn't it?

The Court: December 30, 1941.

Mr. Rose: That is right.

The Court: When was the arraignment?

Mr. Rose: In November of '44. That was the first time he was arraigned.

The Court: The arrest? He had never been arrested before?

Mr. Rose: He had never been arraigned.

The Court: Had he been arrested?

Mr. Rose: You mean put in custody?

The Court: No, had a warrant been issued for him?

Mr. Rose: Yes.

The Court: Had it been served?

Mr. Rose: No.

The Court: When was the warrant issued?

Mr. Rose: Upon the return of the indictment.

The Court: In 1941?

Mr. Rose: Yes, your Honor.

The Court: And it was not served until?

Mr. Rose: And he was not brought into court until November of '44.

The Court: On the 20th day of November, 1944?

Mr. Rose: That is correct. And the corporations were not brought in until the date of trial.

Mr. Tolin: I had understood that he came in and posted bail at the time.

Mr. Rose: That was a voluntary act on his part.

The Court: When did he post bail?

Mr. Rose: In '41.

The Court: After the indictment?

Mr. Rose: After he had heard he had been indicted, he went up there and posted a bond.

The Court: Then there was never any warrant issued for his arrest?

Mr. Rose: No. And he had never been brought into court or—I will ask government counsel to show whether this matter was ever set for arraignment until October, some time three years later.

The Court: It was set for arraignment and he was arraigned on the 20th day of November, 1944?

Mr. Rose: That is correct. [24]

The Court: At which time you presented a motion to dismiss the indictment for want of prosecution?

Mr. Rose: Yes, before Judge Harrison.

The Court: Which was denied?

Mr. Rose: Which was denied on the ground, not that he disagreed that the motion was well taken, but he figured he didn't have the authority. He agreed with me in principle. He thought the motion should be granted, but he expressed a view that he thought that if he did that he would be reversed.

No, then, what I want to call your Honor's attention to is this——

The Court: Just a moment. I want to follow you. Then on the 20th of November he denied the motion, the defendant pleaded not guilty and the case was continued to December 18th at 10:00 o'clock a.m. for setting for trial?

Mr. Rose: That is correct.

The Court: And when was it set?

Mr. Rose: On that date.

The Court: It was set for trial on that date?

Mr. Rose: No, on that date the trial date I think was January 16. That is the date when we appeared before Judge McColloch and that is the date when the two corporations were brought into court for the first time as co-defendants, and that is when they arraigned the corporations.

The Court: There was a trial date of January 16? [25]

Mr. Rose: Yes.

The Court: And did the trial proceed on that date before Judge McColloch?

Mr. Rose: That is correct.

The Court: I am reading here from the pretrial conference. It does not indicate the date.

Mr. Rose: We didn't have any pretrial conference. What happened there, your Honor, was this: Judge McColloch did set a date for a pretrial conference, at which time I appeared, and so did the United States Attorney, but the defendant not being present, Judge McColloch refused to proceed on the ground that in a criminal proceeding the attendance of the defendant was requisite so that disposed of that, and I told him at that time that I didn't think a pretrial conference would be of any value because I told him then that I intended to apply to the Circuit Court for a writ of prohibition or mandate if they intended to try to arraign the defendant three years after the return of the indictment.

Does your Honor follow the chronology there?

The Court: Yes.

Let me review it now. In December, 1941, December 30, 1941, the indictment was returned. The next day the defendant posted bond.

Mr. Rose: Within a day or two.

The Court: The defendant voluntarily appeared without [26] arrest and posted bond?

Mr. Rose: That is correct. I was not his attorney at the time. I am glad he informed me. He said that a warrant was issued on the date of the return of that indictment.

The Court: A warrant was issued?

Mr. Rose: Yes.

The Court: Was it ever served?

Mr. Rose: Yes. He was brought up here in the marshal's office and a bond posted, as he informed me.

(Addressing the defendant): Is that correct?

The Defendant: Yes.

Mr. Tolin: What actually happened, I think, is this——

Mr. Rose: I didn't know, your Honor.

Mr. Tolin: That usually happens with people who have some responsibility in the community. When a true bill is returned and there is a warrant, they are telephoned and let know about it and they come in and surrender voluntarily. That is what he did, so there was a technical arrest in the office of the marshal, and he brought his bondsman with him when he came in so it was all taken care of in one transaction.

Mr. Rose: Mr. Tolin, I am informed by Mr. Danziger that that very fine custom was not practiced in that case. The marshal actually went down there and picked him up at the office. [27]

The Court: Anyhow, in a day or two the defendant was informed of the indictment against him by his arrest?

Mr. Rose: That is correct.

The Court: And he posted bail?

Mr. Rose: That is correct.

The Court: Nothing was then done for three years until November, 1944, at which time he was arraigned?

Mr. Rose: He was informed that he would be arraigned on the date that appears in that record.

The Court: Very well. He was arraigned, and on that date he made a motion to dismiss for want of prosecution?

Mr. Rose: That is correct.

The Court: He did not file a motion to quash?

Mr. Rose: Yes, the nomenclature used in my motion was to quash and to dismiss. If you will note the nomenclature——

The Court: In other words, you only filed one motion?

Mr. Rose: That is correct.

The Court: And that is the motion which appears at page 68 and 69 of your printed record?

Mr. Rose: Before Judge Harrison.

The Court: That motion was denied, he pleaded not guilty, it was transferred to Judge McCormick for setting on December 18, at which time Judge McCormick set it for trial on January 16, and on January 6 a conference was called, at [28] which time the defendant did not respond, or in any event at which time he did not appear, and the court announced the trial would proceed on January 16?

Mr. Rose: That is correct.

The Court: The trial date was set for January 16, 1945, at 10:00 a.m., before Judge McColloch and the trial proceeded on that date before Judge McColloch?

Mr. Rose: That is correct. That is the order of procedure up to that date.

The Court: Then on January 16, which is the time that you are talking about now when the colloquy occurred where you waived a jury?

Mr. Rose: That is correct. Now what happened that morning was this—if you will bear with me—your Honor will note the proceedings that occurred on the 16th——

The Court: While the Clerk is looking for that, the summons and citation on the corporation was made returnable when?

Mr. Rose: On the 16th.

The Court: The arraignment was on the 16th?

Mr. Rose: That is correct.

Now there is another point, Judge Hall, that I would like you to have in mind, and that is after Judge Harrison denied my motion to quash I applied for a writ of prohibition or in the alternative mandate on the Circuit Court, which was not passed on until the 16th of January, at which time I was advised by telegram from Mr. O'Brien that they had denied it without comment. I want your Honor to know that I was waiting at that time for a ruling by the Circuit Court on my application for a mandate or, in the alternative, prohibition. Is that clear to your Honor?

The Court: Your grounds for mandate was that they had waited for three years to arraign?

Mr. Rose: And that they were denying him due process.

Now they denied it without comment, and what happened on the 16th in the morning was this:

Government counsel announced that there was on the calendar for that morning the arraignment of two co-defendants, two corporate defendants, and I advised the court I knew nothing about it, and there was no one there representing the corporation. Whereupon Judge McColloch said, "Very well, Mr. Rose, I will appoint you to represent these two corporations. I will enter a plea of not guilty in their behalf and," he said, "well, in view of the fact that Judge McCormick assigned this to this department, and I am an out-of-town judge," he says, "my present intention is to proceed, and you will represent the corporation."

The Court: Where is that in the record?

Mr. Rose: Right there. You have it right in front of you. [30]

The Court: I have 2000 pages of it here. You say it is on the 16th? I have the minutes of the 16th.

Mr. Rose: If your Honor will go to the proceedings of the 16th——

Mr. Tolin: He is referring to that portion of the record which commences at about page 387. The first reference to that inquiry is on line 5 of page 392.

Mr. Rose: It starts at page 387, and that gives the whole story.

The Court: I have it.

Mr. Rose: I know I called attention to the fact that I was awaiting word from the Ninth Circuit.

The Court: And that you got it?

Mr. Rose: Yes.

I don't want to interrupt you, but we get to the

morning session at page 379—that thing is in the afternoon.

The Court: Very well. I will get to it in a moment.

Mr. Rose: On the bottom of page 383 you will note what the judge says what this affidavit was and what the Circuit Court had not considered because it erroneously did go up as a part of the record.

The Court: Which affidavit are you now talking about?

Mr. Rose: The one filed on the morning of the 16th.

The Court: Where is that in the record? It is not in the printed record. [31]

Mr. Rose: No, it is in the Supreme Court record. I handed it to you. It was printed later.

Mr. Tolin: After the judgment was affirmed, counsel referred to a petition for rehearing and it was then sent up. It had been left out before?

Mr. Rose. That is right: In other words, the Circuit Court and yourself knew nothing about the affidavit I was talking about until after they had rendered their decision.

Mr. Tolin: It was brought to their attention——

Mr. Rose: Upon a petition for hearing.

Mr. Tolin: Yes.

Mr. Rose: That is right.

The Court: This affidavit was before the trial judge?

Mr. Rose: That is the one he is talking about, when he says it wasn't out of his own district. Do

you remember the place I called your attention to? That is what he is talking about at page 383, in the last paragraph.

The Court: I will get to that in a minute.

Mr. Rose: Has your Honor read page 383, the last paragraph?

The Court: Yes, I read from page 379 to page 394, the beginning of the trial.

Mr. Rose: Very well. Now, then, I want to call your attention to this, that when the judge made the statement that he was appointing me over my objection to represent these [32] corporations and he was very apprehensive about this whole business in view of the seriousness of the showing made in the affidavit for a continuance, and that if he was in his own bailiwick he wouldn't be confronted with the problem that he is down here, that he thinks he is going to make me go ahead, subject to matters developing at the trial, and recessed until the afternoon.

Now it occurred to me that the judge here, in all aspects, appeared to be very fair and reasonable. In other words, it was inconceivable in my mind how it would be possible to carry on along the plan that he indicated, namely, that he was starting tentatively waiting for later developments. If these important things became pertinent——

The Court: He said that in the morning. He did not say that in the afternoon after he was advised of the fact of the writ of prohibition.

Mr. Rose: I think he said the same thing in the

afternoon. You will note, your Honor, the statement, "If we are obligated to go to trial we will waive a jury."

The Court: Yes, I find that in the afternoon.

Mr. Rose: Yes. In other words, we were still discussing that business there about whether we were going ahead. And I said, "If we are obligated to, we will waive a jury." Then Mr. Lucas called me on that—and I don't like what is in the record here, and so there will be no confusion about [33] it—I told him that I used the word "obligated" and he ought to know and the court knew.

Now, then, my motion is this: You will note that if I have had——

The Court: Just a moment now. Let me get one point at a time there. At page 392, Mr. Lucas said: "I think we should at this time, if we are going to proceed without the jury, have the waiver of the jury properly signed by all concerned, if the court please.

"The Court: Let me make it plain. It makes no difference to me whether the trial is with or without a jury.

"Mr. Lucas: I think counsel wanted to proceed without a jury."

He was referring to you, was he not?

Mr. Rose: Apparently.

The Court: Continuing:

"I am perfectly willing to proceed without a jury and it is entirely up to the defendant. I want to get the government on record in that regard.

“Mr. Rose: I made it clear, your Honor, that we are prepared to try this case if we are obligated to try it without a jury. I don’t think I want to supplement that by repeating what I have said before.”

That is what was said in the morning.

Mr. Rose: Yes. [34]

The Court: “Mr. Lucas: You used the word “obligated.”

“Mr. Rose: I have already gone on record as waiving trial by jury.

“Mr. Lucas: I think the local rules——

And then you go on and talk about the written order.

Mr. Rose: And I refused to have it signed for the court. Have you found that?

The Court: Yes. All you say, “I am perfectly willing to either sign or orally waive a trial by jury in behalf of the respective defendants, one of whom I appear for without direction of the court.”

Mr. Rose: I made myself clear. The court has indicated that he is appointing me over objection to represent the two corporate defendants that had been arraigned that morning. He has indicated that he is very reluctant to go ahead in view of the seriousness made by that showing, which is the affidavit.

The Court: I understand.

Mr. Rose: Now, then, here is a situation: This is what I think is vital. In other words, if we went into court and intended to waive a jury I would not

have made any argument about refusing to have the corporations waive it because I called the court's attention to the fact that it is required of me to advise them of their constitutional rights, and having failed to do so I would not—but the situation as to [35] those corporations who were saddled upon me was no different than the other defendant, and your Honor will have to admit, as a lawyer of long experience, those remarks of the court about fees, in his own place he would know how to take care of it, in view of this thing he is going ahead with apprehension, subject to later developments, how could you—wouldn't you rationally and properly reach the conclusion, well, in view of this situation it is impossible to proceed along the lines outlined by the judge with a jury so there is only one thing to do, since the judge appears at that stage of the case to be inclined to give us all of the legal rights, depositions, and so forth, how can that be done with a jury? We were at a state of war at that time, the properties involved here were situated in Trinidad, British West Indies, they had a branch office in London, the principal witnesses and the evidence were in Canada, London, Trinidad——

The Court: Did you ever at any time during the trial ask for an adjournment in order to take the depositions?

Mr. Rose: I tried to canvass the judicial mind and ask him what——

The Court: You are always trying to do—let me ask you—when a judge says that, that is why

I have got something here before you that strikes at the very vitals of it—answer me this question——

Mr. Rose: I said, what would you like to hear? He said, I am answering no questions.

The Court: Did you ever ask him subsequently for permission to take the depositions of any of the parties or secure any evidence from any of the places you mentioned in your affidavit that you filed on the morning of the 16th?

Mr. Rose: I have to answer that “No.” What I am telling you is that I was endeavoring to find out what he would like to hear, what his reaction was, and he said that he is answering no questions.

The Court: It looks to me like you were sort of taking a risk, that you were willingly taking a chance, that your client might get acquitted by a trial by the jury.

Mr. Rose: Frankly, your Honor, the way the judge went along there throughout the government’s case, to my great chagrin, it went just the opposite. He seemed to act and support their phase of the case as if he were highly in favor and sympathetic toward myself because that——

The Court: You have been around the courts too long to take any such conduct or attitude as any indication of a binding conclusion.

Mr. Rose: After this experience the answer is “Yes.” But I was still hopeful at that stage of my career. In other words, your Honor, it was one of these things—now, I don’t know; I may be all wet on this thing—but here is a [37] situation where a case is being tried to the court and it develops now

that I know what he had in his mind, it seems to me, in view of the observations that he made in the beginning when the government rested, he said, Mr. Rose, are you prepared to meet all of the issues presented by the government?

The Court: We are still talking about this waiver of jury, now.

Mr. Rose: The waiver of jury was induced by that remark that he was going ahead tentatively on two bases, one on the absence of defense witnesses and evidence, that is not available, and, secondly, on a prejudice that might ensue to Danziger by reason of my representing the two corporations who were saddled in my neck.

The Court: On this one point, the whole question is whether or not your client and you intelligently waived a jury.

Mr. Rose: That is the point. I say we did not.

The Court: What the Supreme Court said is that a waiver of a jury not intelligently made—I do not know what they mean by that, I am not sure that they do, as a matter of fact, but that is what they say, that that is when a person loses his right. Now what do you have here? You have a defendant who has a lawyer. I mean, he is not some backwoods person who has been picked up here by a couple of deputy [38] marshals or policemen and put in jail and misled as to his rights; he is a man of experience, he has as counsel a veteran of very many battles, an astute lawyer, to wit, A. Brigham Rose. It is pretty hard to convince me that the waiver of the jury was not intelligently made and

knowingly made, and made with a full right, because Mr. Lucas says, "We will go ahead and try it with a jury," and the judge says, "I don't care to try it with a jury," and then you say, "I will waive a jury."

Mr. Rose: If we are obligated to go ahead.

The Court: If we are obligated to.

Mr. Rose: And what interjected that? Why, if I wanted to go in there and try that case to the court, would I balk at waiving for the corporate defendants? In other words, when we speak of intelligence—you are quite correct, and I agree with your Honor's observation on exactly what the court has in mind when it says "willful and intelligent." Now intelligence, as I view it, as applicable to that matter, means: Are you doing that with any reservation? Are you doing it because you want to without question? Do you prefer it? Or are you doing it because of something that has taken place?

Now it would be just like when a judge comes in there and he says: Here, I make a showing there that he admits his ground for a continuance. The only excuse he offers is that Judge McCormick assigned it to him. He says, I would be able [39] to meet this situation very easily if I were in my district. Now we are going to require you to represent the defendants that you don't want to represent, and I have misgivings on the effect this is going to have to your client in view of the showing you have made here for a continuance, but let's go ahead. We can't tell in advance what is going to develop.

Now what was I to do in that situation? I told Danziger—that is my point—I said, “You cannot separate a jury if you want to take depositions in London or Trinidad, under the remarks of the trial judge there is no choice, and you have to waive a jury, and that is the situation.”

Now whether that was intelligent or not, I don’t know, but I am assuring you—and I am not speaking with my tongue in my cheek—that if it hadn’t been for those particular exigencies, that forcing me to represent two defendants whose acts would place me in a position where it might be binding on them and would be binding on Danziger, I couldn’t show partisanship, and then he said, well, we can only tell as this develops, whether you will require the witnesses, the defense, and all that.

Now under those circumstances can your Honor recognize what was the matter that persuaded me to advise Mr. Danziger, in the light of this unusual circumstance, to waive, if it was my intention to waive without qualification, why did I when the question came up to waive for the other defendants? [40] And why do I use the word “obligated”? In other words, this isn’t a case where somebody comes in and says, we will try this case to the jury and then they find there has been an adverse ruling and then they come in later and say, we made a mistake in waiving a jury. In that case I agree with the court. If they knew what they were doing and nothing took place and they come in and waive, that is a waiver, they can’t blow hot and cold, but

here you have an unprecedented situation. You have two defendants brought in in the morning——

The Court: I know, but let us go back here a moment to what you say was going through your mind when you advised Mr. Danziger to waive the jury, that you thought you were going to take depositions in Trinidad and London——

Mr. Rose: Correct.

The Court: ——and that you could not separate a jury.

Mr. Rose: I don't think you can.

The Court: I don't think you can either. But who suffers by the separation of the jury? It is not the defendant because as soon as the jury is separated, what happens? The defendant gets up and, I am sure, the defendant's counsel in this case would have done so, and moves for a mistrial and the judge would have had to have granted it. So you could not have suffered.

Mr. Rose: No, there are some authorities where reasonable [41] separation has been allowed.

The Court: There may be a reasonable separation, but if you are going to separate while in Trinidad or London I think that is a different situation.

Mr. Rose: Here is your situation here—then, for example, with those corporations he starts in receiving files wholesale. I said, "Wait until I look at it and make an objection."

He said, "They are all going in. You can make your objection later."

The Court: Counsel, here is the difficulty: I am not sitting here to say that Judge McColloch did

right or wrong. I am not sitting here to say that I would have done the same thing. I am not sitting here even as a reviewing court on appeal might sit in the acts of Judge McColloch. The only thing that I can determine is whether or not the acts of the trial judge were such, were so far wrong as to deprive this defendant of his constitutional right on that one point of a trial by jury. I am not sitting here as to whether he forced you to waive a trial by jury.

Mr. Rose: He didn't force me.

The Court: He could have forced you to a trial that day and you could have still have had your trial by jury.

Mr. Rose: What good would it have been?

The Court: That was up to you to decide at that time. [42] You certainly cannot say, well, what good is it and now come in——

Mr. Rose: Take a trial by jury and then jump up and say, this evidence against this corporation is embarrassing to me. I want to withdraw. I never heard of such a thing. He admitted he wasn't familiar with these proceedings and it was manifest to a point of demonstration.

The Court: You say, what good would it have done? You are now saying that that is what you wanted.

Mr. Rose: I say this, that in the face of this showing we should have had a continuance, we should not have been placed in the position of going to trial that morning or that afternoon.

The Court: If that were error it is not the kind of error which can be reached by a writ of habeas corpus.

Mr. Rose: Yes, it is. It is a denial of the due process clause which permits a witness to have defendants in his own behalf.

The Court: It cannot be reached by a writ of habeas corpus where the same point has already been passed on on appeal.

Mr. Rose: I call your attention to the fact that the Circuit Court had never seen that affidavit at the time that they passed on this appeal. That is why I have printed it for the Supreme Court. It was never a part of their record. [43]

The Court: Did the Supreme Court pass on it?

Mr. Rose: The denial of certiorari?

The Court: Yes.

Mr. Rose: Is that passing on it?

The Court: They denied it, did they not?

Mr. Rose: They denied every writ in a criminal case that came up during the summer session on the first call of the October term. What I was getting at, you made a remark that habeas corpus was not——

The Court: Counsel, you were just about to convince me of something here, and that was, that your point is not that you were denied a trial by jury but that you were denied due process in forcing you to trial when you had good grounds for a continuance.

Mr. Rose: And if I had any idea, in other words, having forced me in the face of good

grounds for a continuance to go to trial with the holding out of the olive branch that if it develops—do I make my point clear—if depositions are necessary we can work that out, I said, well, the only thing we can ever work out is to waive a jury.

The Court: Work out what?

Mr. Rose: To take depositions of witnesses and vital evidence.

The Court: Let me ask you this——

Mr. Rose: In other words, he didn't say when he denied [44] my continuance, for example, does the government want to stipulate what these witnesses will testify to, if they had said "Yes" that would have ended it.

The Court: Did he say that?

Mr. Rose: I said, if he had.

The Court: Did you ask him to stipulate?

Mr. Rose: The judge made the remark that you will note in the record, that with considerable apprehension he believes he is going to ask me to go ahead subject to later developments.

The Court: I am not talking about that now. Did you ask government counsel at any time during the trial to stipulate what these witnesses would say if they were present?

Mr. Rose: No.

The Court: Did you ever file any affidavit or statement or motion wherein you outlined what you expected them to testify to if they were present?

Mr. Rose: Other than what is in there.

The Court: Other than this affidavit?

Mr. Rose: No, that was the extent of it.

The Court: And you never did anything more?

Mr. Rose: I think you will find that pretty elaborate, names of witnesses, what they would testify to, the subject, the place, and everything else. Has your Honor read that yet?

The Court: Do you maintain that if they had been present [45] and testified to what you said here that it would have produced or might have produced a different result?

Mr. Rose: It would have been bound to. Now, look, Judge, for example, I thought he was being facetious when he made that comment about a typographical error. He had a winning way about him. He smiled and I thought he was cracking a little joke, but in the light of later developments I am convinced to a point of demonstration from his remarks that he was convinced that this defendant was a downright crook and that this enterprise, that the stock that was involved in it was not only nebulous but it was an out and out fraud. Now my point was this, your Honor: We were prepared to establish beyond any question of a doubt that \$7,000,000 in American money had found its way into that enterprise, that they had oil-producing wells and geologists——

The Court: Just a moment. I have another court matter, counsel.

(Other court matters.)

The Court: Excuse me, counsel. You were saying something about an olive branch or something.

Mr. Rose: Well, for example, your Honor, what I was getting at is this: Mr. Danziger, as you realize—here is the situation—for example, as I look back now, here is an out-of-town judge and the minute he heard that Danziger was an executive vice president and associate of the old man [46] Doheny he flushed up there and his attitude changed immediately.

Now what I had in mind was this: The judge, from his remarks, from that salvo that found its way later in the record apparently was harboring in his own heart and mind a belief that here was a tinhorn chiseler who was out here interested in swindling a bunch of old women out of a few dollars. He didn't realize that Mr. Danziger had been connected with some of the biggest oil enterprises that this country has ever known, and that he was a legitimate oil man and was a member of the bar for over 40 years.

The Court: I cannot look into the judge's mind as to what he thought.

Mr. Rose: That is why I say that we now know what was in his mind.

The Court: But that was said after.

Mr. Rose: It is a confession. How do you know that happened in the jury room until after they come in with the verdict? They then come in and say, "I said so-and-so," "I didn't like this fellow's antecedents," and everything else. That is the only time I ever find out. The point is——

The Court: Just a moment. That statement which you attribute to the judge as though he proceeded as if there had been a plea of guilty was made by the judge after the judgment of guilty, was it not? [47]

Mr. Rose: After rendition of the verdict, the same as you would find out what happened in a jury room where the jurors, some of them, get up there and say, "I will hang any judge that is ever brought to trial before me," and four or five will say "Amen." You would never know that until the verdict was returned, isn't that right? It is the same thing here. This didn't occur six months later, it occurred relatively within a couple of days. That makes sense now in the light of certain things. In other words, I may be haywire on this but if I came to trial before you, Judge, and you would have made the remarks that he did, saying, "Well, this is a serious showing here for a continuance," after all I think all of this, in view of the charges in the indictment and the seriousness of these charges, here is a lawyer, and all that, and I have been forced to trial, you would say, "I got my calendar fixed up now, I have taken this time out, and we will go ahead." Now if it appears later that you are not given an opportunity to put on a defense and show the things that are vital here, that matter can probably be handled later.

All right. Now if you said that there wouldn't be anything improper about it. I had waived the jury. I would figure later on when the government

rested or got close to it that I would say, "Mr. Justice Hall, you know what we are prepared to show, we have made a presentation, and all that, I am not clairvoyant, I can't come to any conclusion as to what parts of the government's case you require that we offer proof against," etc., I wouldn't expect you to say, "Well, I want this particular proof of that," but I would expect you to say, "Well, I am interested in the bona fides of this company, I am interested in the question whether there were shareholders——"

The Court: Is that not up to the lawyer to say that he would like an opportunity to make a showing?

Mr. Rose: How can I tell when you are sitting back there?

The Court: You are not supposed to tell. You are complaining here now that you say that the judge formed his mind during the course of the trial and you are complaining now——

Mr. Rose: I didn't know it then.

The Court: Not that he made up his mind during the course of the trial and before the judgment, but he made up his mind the other way.

Mr. Rose: But how were we to know it? We know it now. We have his confession.

The Court: Now you say the reason why you are injured is because you thought he had his mind made up your way.

Mr. Rose: No, I say now it becomes important to show, one, that when he denied us due process

in the manner he did by refusing the continuance, then he held out an encouragement [49] to us that if we go ahead he is going to wait to see what develops during the trial, and then of course——

The Court: Why did you not ask him at the conclusion of the government's case to recess?

Mr. Rose: I asked him. I said, "What would you like to hear?"

The Court: At the conclusion of the government's case.

Mr. Rose: Yes. I asked him what he would like to hear and I called his attention to the fact that we had been prejudiced by the denial of a continuance, but I never got anything out of him except one answer, "I am not answering any questions." That was all. I called his attention notwithstanding the government——

The Court: You, as a lawyer, know that there is a way to frame your request to compel a judge to answer questions, to wit, by motions upon which he must act, either grant or deny, and yet—did you make a motion for a continuance?

Mr. Rose: You mean after the government rested?

The Court: Yes.

Mr. Rose: I called his attention to the dilemma we were in in view of the matters I set up in my application for a continuance and waited for him to say something. Now you know, Judge, there is no such thing as a motion for a continuance after the government rests. There is no such thing.

The Court: Oh, yes there is. [50]

Mr. Rose: You mean for the production of witnesses?

The Court: Yes. That was a case of a trial by the judge without a jury.

Mr. Rose: That is the point. You mean the judge has the power?

The Court: You said you were proceeding without a jury now because, you say, "Well, the judge is going along with me and I think he is going to be all right, and if something develops and I need time to get witnesses, I can get it," and when your time came to ask for it you did not ask for time.

Mr. Rose: How do you know what he is thinking about?

The Court: Put it in the form of a motion, just like you have a petition for a writ of habeas corpus. I do not like to answer questions but I am going to have to answer a petition.

Mr. Rose: In other words, when I said to him, "Well, we have been placed in a very odd and precarious position here in view of the fact that your Honor has forced us to go ahead here after the matters that I presented here in my application for a continuance," and I called his attention to certain other matters, and then I say, "May I have some expression from your Honor in respect to what you expect of the defense," and he said, "I am answering no question," what do you think I should have done? Your Honor is overlooking a very important psychological thing that you yourself have [51]

personally experienced, and that is this, that when the government rested its case at that time no more than I do at this time I didn't think the government had made out a semblance of a case.

The Court: You made a motion for judgment of acquittal or dismissal?

Mr. Rose: Yes. He took them all under advisement.

The Court: Then you did not move for a continuance?

Mr. Rose: No. He took it under advisement. He took various of those motions under advisement. He even took the motion to quash under submission.

The Court: We will have a short recess. There is a judges' meeting that I have to attend in a few minutes.

(Short recess.)

The Court: Mr. Rose, I wonder if we could get to that other point, the one that I expressed some concern about, as to whether or not there had been a waiver of the defendants' right to challenge the grand jury, or did you have some particular matter with relation to the point that we had been discussing?

Mr. Rose: Well, what I had in mind, your Honor, is this—I am not saying this from the standpoint of trying to give particular color to this particular case—but I would like to give your Honor my reaction of the overall picture here, and that is this:— [52]

The Court: Why not save that until after you give me the point on the other matter?

Mr. Rose: Very well.

The Court: Because I am particularly concerned about that. I have your motion here.

Mr. Rose: Frankly, your Honor, I was very enthusiastic about the holding in the Ballard case and in the Theil case until I read that opinion of yours in that Local 36 case, and I will go on record right now that I agreed with your observations, and my admiration for your Honor's spirit in this field increased when I read your views of those two cases. Of course I was a little disheartened personally because I considered that a very important case here.

Now as I view the position of Mr. Tolin, and I am not saying this critically because I will say this for Mr. Tolin, he has been the most courteous man I have ever run into representing the government in a criminal case up to the present time.

The Court: He has a very disarming effect, particularly as a prosecutor, I might say.

Mr. Rose: I remember up in the Circuit Court Justice Denman struck his brief and I was very elated—that was on his own motion; I thought that was it—and Mr. Justice Denman said, "Not speaking for my associates, Mr. Tolin, I would like you to at least for my education tell me what this [53] conspiracy is about, or who the conspirators are, etc." I would like to know, but I have never gotten the answer to that yet. That is why I raise it here in my brief.

Now here is my position: As your Honor knows,

the Ballard case had not come down at the time that I perfected this appeal and presented my briefs to the Circuit Court. Your Honor is mindful of that.

The Court: I have the dates here.

Mr. Tolin: Mr. Tolin admits that. [54]

* * *

The Court: Counsel, I do not think there is any doubt but what your challenge to the grand jury on the ground that women were systematically excluded is a good and valid challenge if you did not waive it, and the whole question in this case is whether or not you waived it.

Now what my private opinions might be about the holding of the Supreme Court in the Ballard case—I mean whether or not it was waived—or whether or not in every case that is tried somebody must repeat all of the grounds of invalidity which the Supreme Court has said for 130 years are no good, that is immaterial. In the Ballard case the basis of their decision was that it had not been waived and I have the file here, and they specifically raise the question of the exclusion of the women in the Ballard case. [58]

* * *

The Court: The second time they said he did not waive it. So the whole point on this is whether or not you waived it. In searching the record I do not find any place where you specifically raised that point, that is, that the grand jury, the selection of the grand jury, the manner and method of choosing, was void because it excluded women, unless by your

statement which appears on page 178 of the printed record, your general statement that you move to quash it on the ground that it was contrary to the laws of the United States and in violation of the Constitution.

* * *

The Court: Now the question is whether or not that saves the record for you. The Circuit Court of Appeals said it did not. [60]

Mr. Rose: No, they didn't pass on that point at all.

The Court: They denied your petition for rehearing.

Mr. Rose: I have some authorities that that doesn't mean anything. The point raised for the first time after decision—that is the new memorandum I gave you this afternoon.

The Court: Yes, I noticed that.

Mr. Rose: They are not obligated to reconsider that thing at all. If they had issued a memorandum opinion to the effect that we have considered the new points presented on rehearing and we do not believe they have any merit or anything, but under the authorities and Mr. O'Brien's statement there on his procedure—and I have checked *Corpus Juris Secundum* pretty carefully on that—a petition for rehearing places the petitioner in the position that if a point was available to him and he didn't raise it, their granting of a rehearing didn't mean anything at all. It is just like the Supreme Court denying a hearing after a decision of the District Court.

The Court: I know, but if the point was in the record——

Mr. Rose: I think it is.

The Court: Just a moment. If the point was in the record in the Ballard case the Circuit Court did not notice it the first time, nor the Supreme Court the first time, nor the Circuit Court the second time. [61]

Mr. Rose: The Supreme Court noticed it for the first time in the second one. They said they could take notice of it for the first time.

The Court: That was not on a petition for rehearing. In the Zapp case it was a petition for a rehearing.

Mr. Rose: Second petition for rehearing.

The Court: If you raised this in this record then the Circuit had it before them on a petition for rehearing and it was not a new point.

Mr. Rose: Except that here is what happened in the Zapp case, your Honor. The first petition for certiorari to the Supreme Court went up on unlawful search and seizure, as you will remember. That was the point.

The Court: I know that.

Mr. Rose: This point wasn't even dreamed about in that case.

The Court: It was dreamed about.

Mr. Rose: Well, it wasn't raised then.

The Court: It was in the record.

Mr. Rose: Now the second time they petition for rehearing the Supreme Court denied it. The

third application was to vacate the order denying the rehearing and the original certiorari and they for the first time took judicial notice of that. That is all they say. But that petition for rehearing, as I understand it, unless I am badly mistaken, did not go up there on that ground, your Honor.

The Court: In the Supreme Court it did.

Mr. Rose: I don't think so, your Honor.

Mr. Tolin: The Zapp case?

Mr. Rose: Yes.

Mr. Tolin: In the Zapp case the Supreme Court denied petition for rehearing on still another ground, and thereafter counsel made a motion to recall the mandate on this ground, referring in that motion to the Ballard case.

The Court: And the fact that he had preserved his point.

Mr. Tolin: Yes, and that motion was granted.

The Court: Now here is a case decided February 9th by the Supreme Court on this question about whether or not one waives a constitutional right. I do not suppose that either of you had noticed it in connection with this matter, and I would not have except that I, in reading this, noticed that point. The case is *Musser, et al., v. Utah*. That is the polygamy case in Utah.

In that case the court said:

"The appellant sought review by this court of a decision by the Supreme Court of Utah on the ground that the State convicted them in violation of the Fourteenth Amendment to the Federal Con-

stitution. In the trial court a motion to dismiss the charge at the close of the evidence broadly indicated reliance [63] on the Fourteenth as well as the First Amendments and such reliance was indicated in request for instructions. A preliminary motion to quash the information was stated in broad terms, which it is claimed admitted argument of any Federal grounds. The trial resulted in conviction and the Supreme Court of the state overruled all constitutional objections and affirmed it on argument in this court inquiries from the bench suggested a Federal question which had not been specifically assigned by defendants in this court, nor in any court below, although general transgression of the Fourteenth Amendment had been alleged."

And they went on to hold that they had raised the question.

Now if the general question of the violation of the defendant's rights in the Federal Constitution was raised in the motion to dismiss and quash, and if thereafter the Supreme Court decided a case contrary to the manner which everybody had deemed the law to be under previous declarations of the Supreme Court, the question arises in my mind whether or not the defendant actually waived it.

In other words, did he preserve his rights under the Ballard case by simply saying that this is a violation of the Constitution of the United States?

Mr. Tolin: Of course his language in the Ballard case doesn't just say that. In the same sen-

tence it goes on and specifies exactly what constitutional right is violated.

The Court: But here in the Musser case they say differently. I do not have this record. It may be, Mr. Tolin, that you can get it—I do not know that the Attorney General's office was even in the matter—but you might get the record there to see just the nature and the language of their motion to dismiss.

Of course this goes back to the State for them to determine whether or not their statute is in violation of the Constitution.

Mr. Rose: Of course that has always been a hot question, Utah, as your Honor realizes. In other words, the Latter Day Saints Church has never confessed that polygamy is unconstitutional nor have they ever conceded that the government of the United States had the right to control their freedom of religious doctrine.

The Court: They talk here about exercising the right of free speech protected by the First and Fourteenth Amendments, while you said the Fifth Amendment, due process, and the Sixth Amendment, you mention those in your statement.

Mr. Tolin: Of course the Ninth Circuit has had occasion to pass upon exactly this point in the Redman case.

Mr. Rose: Your Honor, I disagree with Mr. Tolin's [65] analysis of that case. I would like your Honor to analyze that case.

There is a fellow that went up in propria per-

sona, there was no appearance, and I for one agree with that court in this, I had that thing arise in that famous case that I handled on habeas corpus, in re Leach and Huggins.

Now, your Honor, in that case—and I think Mr. Tolin, in principle, will agree with me—all that case holds is that every man who has been convicted for the last 25 or 40 years can't come out with an application for a writ of habeas corpus and say, "The Ballard case says that the grand jury was no good and therefore I am entitled to have my conviction nullified."

In other words, in that case there was no motion to quash the indictment of any character, and I agree with the Circuit definitely on their holding in that matter. In other words, they claim that a man convicted who has not raised any objection or made any motion to quash, in the light of the Ballard case can't come out and say, "Here, turn me loose because the Ballard case says the grand jury was illegally constituted."

That is the distinguishing point, and I don't think it is even worth arguing about.

The Court: I would like to make another observation. I was under the impression when I first began to study this [66] case that that point might fall within the general rule that the sufficiency of an indictment can be raised at any time, but the difficulty with applying that rule to this proposition is that the courts hold that an attack upon the method of selection of the grand jury is not an

attack upon the face of the indictment, and that it is an attack upon procedure which must be made within certain times and cannot, like the other points, be raised at any time before final judgment. At first I was inclined to think that you, having raised it before the mandate came down here, might have raised it in time. But I have since changed my mind on that and now the whole question in my mind is whether or not you raised it or waived it.

* * *

Los Angeles, California, March 2, 1948

2 o'Clock P.M.

The Court: Very well. The Danziger matter. Mr. Rose?

Mr. Rose: I believe yesterday at the time of adjournment we were addressing out consideration to the question as to whether the form of objection raised in the motion to quash the indictment by reason of the nomenclature therein employed was comprehensive enough to reach the point. In passing, as my thoughts take hold here, it occurs to me, first, that your Honor must keep in mind under the supplemental memorandum that I handed to your Honor yesterday the authorities are quite vivid and clear that points raised on the petition for rehearing usually are rejected by the court for no other reason than that they weren't raised at the time of argument and in briefs.

Now it is conceded—it is not subject to controversy here—that the applicability of the holding in

the Ballard and Theil cases was not presented to the Circuit Court.

The Court: What is that?

Mr. Rose: The application.

The Court: It was on a petition for a rehearing.

Mr. Rose: Until the petition for rehearing. In other words, after they had decided the case. But under these authorities that I presented, and in view of the fact that the Circuit made no comment, it will be assumed that they acted [72] in conformity with a line of authorities that I have presented here yesterday and then the memorandum—not that I hold Mr. O'Brien out as an authority binding upon your Honor, but he is in that Circuit.

The Court: His reputation as a sort of a walking university.

Mr. Rose: Especially as to rules and procedural matters in that particular Circuit.

Now I quote from the manual here and point out that they will not consider it. We therefore are confronted with a factual situation here that would be different if the Circuit would have even written a 2-line memorandum, we have considered the matters presented on petition for rehearing and we are inclined to the view that our original opinion is still the judgment of this court, if they even resorted to that you might say, although I take the view, your Honor, that a court having jurisdiction in habeas corpus matters—and I have had a tremendous experience in that field—that the opinions of any court in the land are immaterial and ir-

relevant, as I pointed out in that Johnson case, where it says that the court having jurisdiction over the writ should examine the record and satisfy himself, the Circuit and any other court notwithstanding.

I used to be confronted here with a Superior Court judge who would commit me for contempt and I couldn't get but only [73] about one or two of the local Superior Court judges that would ever entertain an application for a writ. They said that he was a brother judge. Well, I went up to Judge Conway and he said, "You go back there and tell them the mandate of the statute requires them to issue the writ and to hear it and decide it, whether it is a brother judge or otherwise." He said, "You know about that \$5000 penalty, don't you?"

I said, "Yes."

"Well," he said, "call their attention to it."

The Court: I issued a writ for you.

Mr. Rose: I know, but the scope of habeas corpus now has been amplified extensively. I don't know whether your Honor has had occasion to consider this case for yourself, that civil case——

The Court: Which one?

Mr. Rose: Sunel v. Large.

The Court: I do not remember.

Mr. Rose: It is in 91 U. S. Supreme Court, Law Edition Advance Opinion, Volume 17. You have those of course in your chambers?

The Court: I have those at home. I have the U. S. Reports.

Mr. Rose: May I leave this with your Honor? It is a very illuminating case and it is by far the most exhaustive [74] treatise on a review of the attempted past limitations on the field of habeas corpus and it is very comforting to note the trend in respect to the latitude that should be resorted to in habeas corpus as reflected in both the main and dissenting opinions there.

To get back to this motion to quash. Your Honor should first consider, it appears to me, this: Was the composition of the grand jury that indicted Danziger a body that could have been remedied if a motion had been made that he had been arraigned as required by the statute promptly, could that in the light—by the way, in that Sunel case they speak about something which your Honor commented on yesterday afternoon, about the law crystallizing and later, after an event has occurred——

The Court: That is the turning point of the decision.

Mr. Rose: Yes. In other words, that is my point.

Now they comment on that and I think they present it in a manner that would be more illuminating to your Honor than my attempt to expound on it.

Now as I say, your Honor, here the numerous incredible and unusual events all seem to revolve and transgress each other and it becomes a sort

of an endless case. For example, take the question of a timely motion to quash in this case. He hasn't been arraigned, as your Honor knows, now for almost three years and if my memory serves me there must have been [75] at least six different grand juries formulated within the interval of the return of his indictment and his arraignment, so termed. So we are not confronted with a situation here where it may be urged by opposing counsel, well, if he had made his objection timely to the indictment why we could have remedied it or rectified it because from a standpoint of pragmatism it must be conceded that that could not be done here. It was water over the dam six times. There had been six grand juries impaneled during that interval. Therefore it wouldn't have made a particle of difference.

So I say that the first available opportunity after I was attempting to protect the legal and constitutional entitlements of the defendant in attempting to secure for him due process and attacking the manifest denial of due process to him, and then being forced to trial as I was, I raised that objection at the first opportunity that I could raise it. In other words, there was something for me to put my teeth into at that time. It hadn't existed before.

The Court: You mean after the Ballard case was decided?

Mr. Rose: No, the Ballard case had not been decided.

The Court: I say, that was after that, on your petition for rehearing, that is the first time?

Mr. Rose: No, your Honor. That isn't exactly what I have in mind. I have in mind that I developed in the cross-examination during the government's case that the indictment [76] had been procured on absolute hearsay evidence and I canvassed that thing and developed it.

I will say this for Judge McColloch, he didn't reject that on account of its untimeliness. That was the only argument made by Mr. Lucas.

The Court: You just said a moment ago that that was the first time I could raise the question, and I thought you were talking about that that was the first time you could raise the question concerning the method of impaneling the grand jury.

Mr. Rose: That is true.

The Court: When was that?

Mr. Rose: On the petition for rehearing. But I mean the other aspect that Mr. Tolin—he tries to place a narrow construction on it——

The Court: He has not had much of a chance to say anything yet.

Mr. Rose: He has got it in here. He has resorted at considerable length to urge the proposition that he doesn't like that broad language that I used in the ultimate objection, the motion to quash. He claims I was addressing this motion solely and distinctly to the hearsay phase. But I say that an analysis of my objection cannot be so narrowly construed. That is the thing that generated the motion to quash, and while I was at it I, from experience, enlarged on [77] my objection to embrace

everything that could have been embraced and my application was addressed to your Honor in the motion to quash the indictment upon the grounds that the same was procured contrary to the laws of the United States and in violation of the constitutional provisos, namely, due process, the equality protection of the law, and I add on about the hearsay.

Now, then, in that case that your Honor so graciously commented on, I had that copied today and I think, your Honor, that this places a very strong argument in favor of my position, and I thank the state that has been one of my nurturing places for coming forth with this helpful thing at this propitious time.

As your Honor pointed out, this decision embraces the very thing we are talking about here. In other words, there was some generation of a possible transgression of the Fourteenth Amendment, and then they state, after rehearing it convinces them that questions are inherent in this appeal which were not presented or considered by the Supreme Court of Utah. Then they comment that the trial here was not conducted in Federal Court, indicating that if it had been that point definitely, in the light of the dissent here, would definitely have struck a more forceful blow than it did in reviewing a case which they, under policy involving a state, usually remanded to the state court. [78]

Now in the dissent of Mr. Justice Rutledge, with whom Mr. Justice Douglas and Mr. Justice Murphy concur, said that he would make a different disposi-

tion of the case. He then goes on to determine the case on its merits and winds up by saying that since therefore the conviction may rest on the ground of invalidity under the Federal Constitution, that he would reverse the judgment.

Now there are three of our outstanding protagonists in the highest court of the land here who go further and say, well, here is a point that we have raised ourselves. They haven't raised it. There has been a violation of a certain fundamental law guaranteed under the laws of the United States. We would take and reverse it. We wouldn't even bother about sending it back.

I think it is very comforting and I think it is at least an expression of the highest court on the very thing that we are giving consideration to here in this hearing.

Now, your Honor, did you read the Rodriguez case that I cited in my memorandum? Here is an expression of the United States Supreme Court, and in this case, your Honor, the grand jury was attacked first in a motion for an arrest of judgment. It says:

"The government, however, contends that the motion in arrest of judgment came too late and in support of that view cites *Lang v. Gale*." [79]

Then it goes on to say:

"But in the same case the court said, what is pertinent to the present discussion? There are cases undoubtedly which admit a different consideration and which the objection to the grand jury may be taken at any time. These are——"

The Court: What is the citation?

Mr. Rose: 49 L. Ed. 994. I have it in my memorandum here.

The Court: You do not have the United States citation?

Mr. Rose: I think I can find it.

The Court: Do not bother. I thought I would take a glance at the case now. Go ahead.

Mr. Rose: You see, this Rodriguez case which, incidentally, is some 41 years before the Ballard decision, it points out that their holding, and also the Gale case, the nomenclature that I cited from the Rodriguez case, that is, there are cases undoubtedly or where some other fundamental requisite has not been complied with, and they claim that that can be raised at any time.

So you have two United States Supreme Court decisions that indicate—of course we have to use this broad omnibus statement—in other words, where it hadn't been properly impaneled, where it is void or where some other fundamental requisite has not been complied with. [80]

The Court: In other words, your position is that that case holds that you can raise a constitutional question at any time unless you specifically waive it?

Mr. Rose: That is correct. And we don't have to go so far, your Honor, we don't have to hold that the Ballard and Theil cases are constitutionally fundamental violations. They claim that the jury was impaneled in violation of the laws of the United

States and the policy of the laws of the United States.

The Court: What law? The Constitution?

Mr. Rose: Well, let's see the exact nomenclature that they use here.

The Court: You do not need to bother. I have read it.

Mr. Rose: They say that Congress has provided that jurors in a Federal Court shall have the same qualifications as those of the highest court of the law in the state judicial code—and they cite the code—which provision applies to grand as well as petit jurors. In California and in most states women are eligible for jury service. So they conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that as in the Theil case they should exercise their power over the administration of justice in the Federal Courts to correct errors.

The Court: That is the basis of their decision the, is [81] it not, that they exercised their powers over the administration of justice in the Federal Court in this particular case?

Mr. Rose: No, because every time that matter has come up subsequently, like in the Bell case and the Zapp case, and such cases, they haven't even bothered about writing an opinion. You know that. They have merely referred to the Ballard case.

The Court: They did not do that in your case.

Mr. Rose: They didn't grant me a writ.

The Court: But you had it set forth in your petition for certiorari, did you not?

Mr. Rose: Well, your Honor, I am surprised—I don't know—your Honor knows that a lot better than I do, that it has been repeatedly held that the denial of an application of certiorari by the United States Supreme Court is not an affirmance, or an approval or anything else of the Circuit Court's opinion.

In other words, I can say this, that we didn't fare any worse than a couple of hundred at least other applications from all over the United States when that October term opened and vacation was over. All of at least 200 some-odd certiorari petitions were likewise denied, so we don't stand alone. That is why I got a lot of comfort from the form of the mandate which says it leaves it open to the condemned individual's rights as guaranteed by the laws of the United States [82] and the Constitution.

I claim that the holding in the Ballard case squarely meets the nomenclature in the Rodriguez and the Gale cases which say that where the whole proceeding of forming the panel is void, or has been selected by persons having no authority to select them—which is the case here—or where some other fundamental requisite has not been complied with.

Now it is quite true that the Rodriguez case and the Gale case do not say where they have excluded women, or anything else, but you cannot escape the fact that the Supreme Court says that

the grand jury can be attacked at any time when any of these matters are present. In other words, the Ballard case and the Theil case definitely hold that the grand jury that indicted Danziger was no good, that it had no power to indict him. They don't say that they had no power to indict Ballard, because, as one of the contentions, as I remember, that was raised in there was that that was a woman defendant. I think that was one of the issues that Mr. Justice Denman struggled with when that point was up in the Circuit. But the fact that they have used that as the solitary and sole basis for a dismissal of the indictment in the Zapp case and in the Bell case and in one other that I don't recall at the moment, with just that short and curt remark—the matter is remanded with direction to dismiss the indictment. *Ballard v. United States*—and that shows that they [83] are not applying, as your Honor suggests, that holding because they are trying to supervise what occurred in that particular case. I don't think that is what they had in mind at all.

Now as I said yesterday, I read with considerable interest your observation in the Local 36 case and I can see where your conclusion reached in that case was well grounded, but on the other hand we get down to fundamentals here. Why should Zapp, Ballard, Bell and other persons have their indictment quashed on that solitary and sole ground—and that is the only ground that has ever been advanced in those special cases—when here we have

an accumulation of a maze of proceedings that are so paradoxical to due process that it is inconceivable who one can examine this record and sincerely claim that the defendant, the petitioner herein, had a fair trial and due process. Everything has happened in this case. I don't know of a case in point and I don't think your Honor does. There has never been a case where so many things were wrong. Why in this case here the court received hundreds of documents without even giving me a chance to read them and make an objection. He said, they will go in and you can make your objection later. Then, by George, he admitted documentary evidence which may have been binding on the two corporate defendants who have come out of this——

The Court: You are not making that as one of your [84] points?

Mr. Rose: No. I claim the whole procedure was wrong.

The Court: You claim that everything the judge did was wrong, is that it, or almost everything?

Mr. Rose: Almost everything. Honestly I do, your Honor. And I say that with the utmost sincerity.

The Court: Very well.

Mr. Rose: I am not saying that critically because I know your Honor is not going to be impressed by my opinion about what a judge did or what he didn't do, but I say here—which, incidentally, while I am discussing this, your Honor,

I had this in mind yesterday—when the question came up about what happened, why I didn't make a motion at the end of the government's case for a continuance.

Now your Honor is a trial man of great experience and knows that lawyers are not infallible. They are victims sometimes of not their imagination but victims of what they observe take place in court. Now, for example, when the government rested its case, that was the first time—and if your Honor will read that record you will find that incredible dialogue between the trial court and Mr. Lucas—after the government had rested and after the judge told me, if you don't think that this man can take the stand and say he was the agent of Danziger, and I disagreed, and then he said to Mr. Lucas at the conclusion of the government's case, I have [85] had no experience in this form of charge. Now what are the elements of this offense? And Mr. Lucas said that the Securities Act violation charged in that indictment was identical with the mail fraud action.

Now your Honor knows that that isn't true. Then when I wanted to reply to it the judge said, "I will look into this for myself." Now it was my view as a lawyer—

The Court: What has that to do with whether or not you waived the point on the composition of the jury?

Mr. Rose: I didn't waive it when I made my motion to quash.

The Court: I said, what has that to do with whether you did or not?

Mr. Rose: I am simply showing—I was advertising back to what your Honor raised yesterday in regard to my motion.

The Court: But you did not make a motion at the end of the government's case.

Mr. Rose: In other words, I was satisfied in my own mind that the government had not established any semblance of a case, and I still am of that opinion.

The Court: Then you risked your judgment.

Mr. Rose: Wasn't that up to the judge in view of his remarks?

The Court: No, I do not think so.

Mr. Rose: Right now you and I know from what we have in [86] the record here that if I even had had Danziger here as a witness in that proceeding it wouldn't have made a bit of difference with that particular judge.

The Court: I do not know that.

Mr. Rose: He said so right there. It is in the record. He had reached a definite opinion and was proceeding as if the defendant had pleaded guilty and he didn't understand why I was wasting time in even putting on a defense. So we have so much for that on the subject of whether that point was reserved.

Now we get into another significant and important point here, and that is the failure to arraign the defendant. Your Honor must keep in mind that

there is a statute which was applicable at the time of this indictment which required and made it mandatory when the defendant was arrested to take the defendant before the nearest commissioner or nearest judicial officer having jurisdiction. Now your Honor is familiar with the McNabb case and the Anderson case and all those cases which have arisen out of that particular statute.

To me, the case of *United States v. Haupt*, 136 F. (2d) 661, is the most persuasive authority because in this case they definitely hold that a defendant cannot waive arraignment. In this case the man signed a waiver of arraignment with the FBI. That is what he did here. And here is the nomenclature employed by the court: [87]

“How can it be said that one under arrest may waive the duties imposed by law upon the arresting officer? To so permit would mean that the duties of an arresting officer were dependent upon the action of the arrested person, rather than upon the action of Congress.”

The Court: What is that case?

Mr. Rose: *United States v. Haupt*, H-a-u-p-t; 136 F. (2d) 661.

“In such case, the statutory requirement might be readily nullified merely by obtaining from the arrested person a so-called ‘waiver of custody.’ This would require consideration again of whether the waiver was voluntarily made and ‘competently and intelligently’ entered into.”

Now that is exactly what I am getting at. The Circuit Court and Mr. Tolin have apparently missed

my point because surprisingly the author of this opinion, Mr. Justice Healy, in the case of *Reynolds v. United States*, 138 F. (2d) 346, says:

“The directive (he is talking about the necessity of arraignment) is not something which the officer is free to comply with or ignore according as he may think the exigencies of the situation demand. It is a fundamental right designed to safeguard the individual in the free land against [88] the arbitrary exercise of power.”

Now both the Circuit Court apparently and our astute Mr. Tolin here have taken the view that because they cite certain cases that hold that after a defendant has appeared and he is accountable for the delay he cannot lay claim that he hasn't been afforded the speedy trial secured to him by the Constitution of the United States because in that case he himself has delayed it, although I question it, your Honor, and I think it is about time we got a ruling. I take the view, and the decisions that I have presented, some of them here I think properly interpreted would hold that in regard to procedure, such as arraignment and matters of that kind, the Federal Courts employ the practice prevalent in the jurisdiction.

Now I cited originally a couple of cases where the District Court of Appeals here dismissed an information because the judge stalled around—it was one of Mr. Lavine's cases—where the judge stalled around for two or three days, passed the 60-day limitation, saying that he had matters under

submission and that he was busy, and they ordered that information conviction set aside on the ground that there was no legal basis for that.

However, that law is definitely established here by our Supreme Court. It is incumbent upon the government to show a legitimate excuse for a delay past the 60 days. [89]

The Court: What is the statute?

Mr. Rose: 60 days.

The Court: For arraignment?

Mr. Rose: Immediately. Like ours. The language is the same.

The Court: The statute requires the defendant to be arraigned as soon as practicable.

Mr. Rose: It is practically the same as our Federal statute, which wasn't in existence at the time that some of these old cases cited by Mr. Tolin were tried. That statute was not in existence at one time. There are a line of old cases which invoke the common law, and of course there is a distinction. But here where the act of Congress requires that the arresting officer can't shift the burden of arraigning the defendant and bringing him before a magistrate or a judge promptly, he can't say, well, it is up to the defendant. They hold in this case that he can't even get a waiver of it.

The Court: The Circuit Court passed specifically on that point.

Mr. Rose: No, they didn't, your Honor.

The Court: That is the first paragraph of Judge

Healy's opinion when he gets down to it.

Mr. Rose: But they are confusing the matter of arraignment with the matter of an early trial. They were reviewing that affidavit. [90]

The Court: I do not know whether they were confused or not. That is not what they said.

Mr. Rose: Well, they can't blow hot and cold in that other decision that I just read, the same author of the opinion on the matter of arraignment said that as a directive it is not something which the officer is free to comply with or not.

The Court: Is that the Haupt case?

Mr. Rose: No, that Haupt case says that he can't even waive arraignment by writing. This is Mr. Justice Healy, with Judge Garrecht and Judge Stephens concurring, in a case entitled *Runnell v. United States*, where the man was arrested on June 24th and taken before a commissioner on July 14th. Now what happened here—I don't know whether it was due to my negligence or what it was due to—but I am satisfied that that Circuit Court opinion, because the authorities that were presented by the government in opposition to that point, had nothing to do with arraignment. They were all cases where the man had come in and made motions and made a demurrer, and so forth, and then they were out-of-state jurisdictions and not in this particular locale, and where there was a delay due to some action on the part of the defendant, and they say he can't claim it because he should have come in—that is what they all turn on—is this very

thing that I am about to announce. They say he should have come into court [91] and demanded it, that he get an early trial, but where you have not brought the defendant in and arraigned him and had him plead, this would be novel indeed that a defendant would walk into this court here, for example, and say, "Mr. Justice Hall, I was arrested here about a month ago——"

The Court: Or last week.

Mr. Rose: Yes—"and I want you to arraign me. I want to enter a plea here."

You turn to the Clerk and say, "Is this matter on the calendar," or something of that kind. But whoever contemplated, as this McNabb case says, as the Haupt case says and even the Runnell case, you don't pass the responsibility of the man that serves the warrant on to the accused and say that he is supposed to initiate the business of setting the matter of his arraignment on the calendar. That would be a novel thing indeed.

The Court: It does not appear to me that the Circuit Court by their language indicated that they were confused.

Mr. Rose: I read it over after your Honor made that comment, and I am satisfied that what happened was, during the oral argument there, your Honor, that point—there again I was thrown off—Mr. Justice Denman finally indicated that he was of the opinion that there had been a denial of due process in this case and asked the government to file a new brief. [92]

JACOB MORRIS DANZIGER

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Jacob Danziger.

The Clerk: Jacob Morris Danziger?

The Witness: Yes.

The Clerk: Take the stand.

Direct Examination

By Mr. Rose:

Q. Mr. Danziger, you are the petitioner in this case? A. I am.

Q. Now in respect to the proceedings had on January 16 of 1945 in Judge McCulloch's case, do you recall being called upon in that connection to express your disposition to proceed by way of trial to the court or jury? A. I do.

Q. At the time that you entered the court on that date, January 16, 1945, was it your intention to waive trial by jury?

A. No, it was not, Mr. Rose. You and I had been discussing the matter from the time you first came into the case, which was a few days before I was ordered to be arraigned, and your advice to me was—and I agreed with it—that we [98] were to have a trial by jury.

Q. You know, as Mr. Justice Hall indicated yesterday——

The Court: Judge Hall, not Mr. Justice.

Mr. Rose: Very well.

(Testimony of Jacob Morris Danziger.)

Q. —made reference to the record of a written waiver. Do you recall the circumstances under which that was signed? A. Yes, I do.

The Court: What were they?

The Witness: In the morning of that day the court said that he was inclined to deny a motion that we had pending for a continuance for the purpose of taking depositions. He said something about, "I am only stating it professionally now," and he went on to say that if it appears later in the case that the evidence is important to you—I don't know whether he used that exact language—he would grant a continuance, or what he said, but the import of what he said was that a motion for a continuance then would be in order, and during that recess at noon Mr. Rose said to me that under those circumstances you will never be safe in going to trial with a jury, and I agreed with him, as my own intelligence told me that it was an impossible thing to do, and he recommended, and I made up my mind, that I would waive the jury if the court made the ruling that he indicated in the morning that he was going to make. And that afternoon he did make that ruling affirmatively [99] and I then waived jury.

Q. (By Mr. Rose): Was it your impression at the time you waived the jury that the trial court was to make known what he required of us in respect to the evidence that we had presented in the application for a continuance?

(Testimony of Jacob Morris Danziger.)

Mr. Tolin: That is objected to on the ground it is incompetent, irrelevant and immaterial, calls for speculation, conjecture and surmise.

The Court: It is compound and complex. I do not understand the question. Will you reframe it?

Q. (By Mr. Rose): From the remarks made by the trial judge, what was your impression in regard to the necessity of waiving a trial by jury?

The Court: He just got through testifying to that.

Mr. Rose: Very well.

Q. Had you known that the disposition and the availability of the evidence which you presented as desirable in support of your evidence as contained in the affidavit that was presented to Judge McColloch that morning—would you read as far as I have gone, Mr. Reporter? I lost track of what I was saying.

The Court: You had better start over again.

Q. (By Mr. Rose): At the time that you waived trial by jury in the manner reflected by this record, were you of the opinion that in view of the remarks made by the trial judge that you would be afforded an opportunity to produce witnesses or get depositions before the trial was finally concluded?

A. Yes. I was of the opinion that if the court thought that the evidence was proper in the case that he would then grant a continuance. That is what I understood him to say in the language that he used.

(Testimony of Jacob Morris Danziger.)

Mr. Rose: You may inquire.

Cross-Examination

By Mr. Tolin:

Q. What is your occupation, Mr. Danziger?

A. I am a lawyer. I haven't been practicing for some years though.

Q. When were you admitted to the bar?

A. Something over 40 years ago.

Q. In the state of California?

A. Yes, sir.

Q. And you were admitted to the bar of the United States District Court for this district, I take it?

A. Yes, sir.

Q. About when?

A. About 40 years ago. [101]

Q. And you have remained a member of the bar of this court during that 40-year period's time?

A. I have, sir.

Q. You have been active with Mr. Rose in the management of your defense in this case—by “this case” I mean the one that was tried before Judge McColloch?

A. I was active in preparing the case and getting evidence together and informing him of what the case was all about and I think running down some of the authorities.

Q. When the case was called for trial in Judge McColloch's court, you understood and knew at that time, did you not, that any person charged with

(Testimony of Jacob Morris Danziger.)

crime was entitled to be tried by a jury?

A. Yes, I knew that general principle of law. I have known it for many, many years.

Q. And you knew that there was a jury available to try your case if you desired a jury trial?

A. Well, I am sure there would have been had I so requested.

Q. Now Judge McColloch didn't ask you to waive trial by jury, did he? A. No.

Q. The United States Attorney didn't ask you to waive trial by jury?

A. He didn't. Nobody asked me to do anything. Mr. [102] Rose as my attorney may have construed some of the language that was used at the time in that direction. I don't know. I didn't take it into account.

Q. So far as you were concerned, the waiver of trial by jury was a matter of judgment on your part and that of your counsel, wasn't it?

A. It was. I recognized that I had the final say on the matter, and of course I consulted with Mr. Rose on the general subject.

The Court: It was your best judgment at the time that you should waive trial by jury?

The Witness: Not up to the time that the court made—not prior to the time the court made its remarks that day. When I did waive it was my judgment, based upon consultation with my counsel, that the waiver should be made.

The Court: And you based that upon the propo-

(Testimony of Jacob Morris Danziger.)

sition, if I understand you correctly, that you understood that if you had a jury trial and had to seek a continuance for the purpose of getting witnesses it would not be likely to be granted?

The Witness: No. My thought was that the court, if we had a jury, would not be very apt to grant a continuance.

The Court: That is what I asked.

The Witness: Because it was something he couldn't do. He couldn't grant a continuance that would run for a great [103] many months. The affidavits that I suggested that I wanted to get, or the depositions, were in London and in various other places, that we were at war at that time, and I felt that the court wouldn't be apt to grant a continuance if it came to a point that we had a jury.

The Court: Very well. Any other questions?

Mr. Tolin: Yes.

Q. Mr. Danziger, you never thereafter made or heard made on your behalf any motion for a continuance for the purpose of taking depositions, did you?

A. I have no recollection of it unless some of the remarks that Mr. Rose made to the court in the argument might possibly be construed as a request. I do remember that I got out the testimony myself where Mr. Rose on two or three occasions deplored the dilemma that we were in because we were not able to take the depositions. Now I don't want to

(Testimony of Jacob Morris Danziger.)

sit here and say that that was or was not a request to the court, Mr. Tolin.

Q. So far as you know you don't recall that there was any request of the court made?

A. Unless those remarks can be construed to be such. I have no recollection of anything other than that.

Q. Now, Mr. Danziger, when you were arrested in this matter, that was within a few days after the date the indictment was returned into court?

A. That is correct.

Q. Did you appear before Commissioner Head in connection with the posting of your bail?

A. Not at all. The bail was fixed on the indictment and the arresting officer came with a warrant, not the indictment; he came with a warrant and I went with him to the marshal's office and the marshal permitted me to telephone, and I telephoned to some friends, and before that day was over a bond was posted. I never was before any commissioner. I have never seen Mr. Head in my lifetime. I wouldn't know who he was. And nothing happened except that.

Q. At about that time you went into the Clerk's office and read the indictment?

A. On my way from the——

Mr. Rose: Just a minute, your Honor. I submit that that isn't a proper inquiry. I didn't go into that subject at all.

The Court: Overruled. You did read the indictment that day?

(Testimony of Jacob Morris Danziger.)

The Witness: No, I didn't read it. I never read it until we were in Judge McColloch's court. I scanned it. I got a copy of the indictment. I went to the Clerk's office and asked for it and it was given to me.

Q. (By Mr. Tolin): That was on the day you made bail? A. Yes. [105]

Mr. Tolin: That is all.

The Court: Is that all?

Mr. Rose: Just one further question.

Redirect Examination

By Mr. Rose:

Q. Some inquiry has been made by government counsel respecting your activity as a lawyer. Have you ever handled any criminal proceedings?

A. Never in my lifetime have I ever handled a criminal case.

Mr. Rose: That is all.

The Court: Step down.

(Witness excused.)

The Court: Have you finished?

Mr. Rose: Yes.

The Court: Mr. Tolin, it looks like your time has arrived. You say you want 10 minutes?

Mr. Tolin: I said 15 but possibly I can get through in 10.

The Court: We will go ahead, or do you want a recess at this time?

Mr. Tolin: Perhaps if we took one now I would have an opportunity to collect my thoughts.

The Court: Very well. We will have a short recess.

(Short recess.) [106]

The Court: Mr. Tolin?

Mr. Tolin: May it please the court, there has been a great deal said here about the likelihood that the Appellate Court did not consider that point which I think is the only question presented here today, that one about the absence of women on the grand jury.

I recall the day that this case was argued on its merits in the Circuit Court. I had quite a bad day of it because, as Mr. Rose has pointed out, my brief was stricken and I was told to write another one. But as we were waiting for the court to convene Mr. O'Brien came into the courtroom and he said, "This will interest you gentlemen," and he handed us a copy of the opinion in *Bell v. United States*. It was still in typewritten form. It was going to the printers. The court had just decided it that morning.

The Court: That was the Circuit Court?

Mr. Tolin: Yes. And it said, upon the authority of *Ballard v. United States* the court reverses the judgment and sends it back to the trial court for dismissal. In substance that is what it said. I think that was perhaps the first time that anyone connected with the Danziger defense had any idea of dissatisfaction with the complexion of that grand jury.

The Court: The *Ballard* case was decided after

the opinion in this case. The Ballard case was decided by the Supreme Court. This case was decided July 8, 1947, and the Ballard [107] case was decided December 9, 1946. When was this case argued?

Mr. Tolin: It was argued about a month before the decision.

The Court: The rehearing was denied July 8th. It does not give the date of the decision. That is the date of the rehearing. It was argued in the Circuit Court of Appeals before the decision in the Ballard case, was it not?

Mr. Tolin: It was argued after the decision of the Ballard case and following the decision of the Ballard case by just a few days the Circuit Court then decided the Bell case and we were then up there the day the Bell case was decided. We were before the Circuit Court for argument on that day. I think it was the occasion perhaps of the second argument. We were there and argued it twice.

The Court: That was on the rehearing?

Mr. Tolin: No, we argued it twice on the main appeal, but that court then was exceedingly Ballard case conscious, it was exceedingly grand jury complexion conscious, and we all became that way, too. Mr. Rose filed his petition for rehearing and followed it up within a very short time with a supplement to it which was accepted and then immediately after the court received that supplement to the petition for rehearing I received a memorandum from the court to file a reply thereto.

Well, the petition for rehearing as originally drafted [108] was merely a rehash of the matters which had been argued on the case in chief, and I took it we were urged to file a reply to the petition for rehearing, which Mr. Carter told me had not happened within the history of the United States Attorney's office as long as he had been connected with it. Sometimes on our own motion we would file a reply, but the court had never asked for one. I took it that they were interested in the question that Mr. Rose had propounded, namely, that there were no women on the grand jury. So we set about and briefed that particular question and sent it up, whereupon the court denied the petition for rehearing.

It occurs to me that a lot has been said about this being a constitutional question, and that perhaps it isn't a constitutional question after all. The Ballard decision refers to the statute which prescribes that juries, grand juries, in the District Courts shall be impaneled from persons having the same qualifications to serve as jurors in the courts of the state, and it was briefed in the Ballard case, that women were eligible to serve as jurors in the state of California and had been for 28 years prior to the impanelment of the particular grand jury which indicted Mrs. Ballard, and that the studious or systematic exclusion of women from the grand jury of this court was not in compliance with that statutory requirement.

The Court: There are a number of things that

are wanting in both the Ballard case and the Theil case for the sake of [109] clarity.

Mr. Tolin: Yes.

The Court: I have studied them many times, and while the court said in the Ballard case that they were reversing it by virtue of their power and supervision over the lower courts, which would indicate that they thought an injustice had been done in that case and they were going to supervise it by sending it back, and while it is true that they refer to the statute, still they base their decision on the fact that there had been a systematic exclusion of women.

Mr. Tolin: Which violated the statute.

The Court: Which violated the constitutional right, according to the previous decisions of the Supreme Court. I refer particularly to the White case and several cases arising in Texas, as well as the Virginia case, where they raised the question that the states had violated the Fourteenth Amendment because they had systematically excluded Negroes.

So it seems to me that that was the basic constitutional right. I do not know what else they were basing it on. They refer to statutory rules, but they do not refer to any statute at all or any rule of court or anything else about the method of selecting juries and grand juries.

Mr. Tolin: Sometimes it is unfortunate, from the standpoint of trial courts like yours, and trial attorneys like those in our office, to find that courts of appeal are so [110] careful to not express them-

selves any more than they have to to decide the particular case. If they would give us a little more advice on these things we perhaps wouldn't have these long hearings, and matters would not be so, in doubt. However, we have to take things as they are given to us.

The Court: Yes.

Mr. Tolin: The cases to which Mr. Rose has referred, and indeed this case of *Musser v. Utah* to which your Honor referred yesterday, comment upon broad terms. For instance, in *Musser v. Utah* a preliminary motion to quash the information was stated in broad terms which it is claimed admitted of argument of any Federal grounds. And they go on in all these cases to talk about the broad terms of cases which were laid.

The Court: His written motion was not broad but his oral statement was certainly broad.

Mr. Tolin: His written motion didn't go to this subject at all, it went only to the matter of no arraignment.

The Court: That is right. But his oral argument and his oral motions state that he moved to quash the indictment on the ground that it was contrary to the laws of the United States.

Mr. Tolin: Well, your Honor, I wonder if it is broad or if it is just lengthy. I think it is not so broad. May I read it?

The Court: I have read it a dozen times. [111]

Mr. Tolin: Well, your Honor will recall that it starts out—just referring to it then without reading it all—by a comment on the testimony of Mr.

Maitland and Miss Skinner, and that those people had told how they testified before the grand jury and that it was apparent to Mr. Rose that if the grand jury indictment was obtained upon testimony of that sort it was obtained upon hearsay testimony.

Then he goes on to say that he hadn't been apprised of that and so furthermore he wasn't in position to interpose any dilatory pleas, that in the normal course of events had this case progressed along usual lines I submit, your Honor, I would have made a motion to quash the indictment on the ground that it was procured illegally, contrary to the laws of the United States, and it was procured purely on hearsay and on insufficient evidence to warrant and support the indictment.

I suppose the judge hearing that would take it that the language, "that it was procured illegally and contrary to the laws of the United States," followed immediately by a particularization that it had been obtained upon hearsay and unsubstantial evidence, would mean that it was that particular matter rather than any other.

The Court: I think so.

Mr. Tolin: So you see it is not a motion which is in broad terms. He doesn't just come in and say the Fourteenth [112] Amendment is violated, the Sixth Amendment, or any particular amendment, or any particular constitutional right which the defendant had. He refers to those things and then he immediately ties to it this very specific and narrow charge.

Then he goes on to say the part that he has quoted in his memorandum on this habeas corpus proceeding:

“For that reason (tying back to what I just read) now that these facts appear evident at the conclusion of the government’s case, I addressed to your Honor a motion to quash the indictment upon the grounds that the same was procured contrary to the laws of the United States in violation of the constitutional proviso, namely, due process, the equal protections of the law and the statutes in cases concerning the subject of the requisite evidence and character of evidence essentially required in order to vote an indictment against an accused and put him to trial.”

Now I don’t feel that we can say here now that Mr. Rose addressed any broad motion upon constitutional grounds generally. He instead attempted to address a specific grievance that he had about the hearsay testimony of Maitland and Skinner, as he considered it to be, to those particular constitutional provisions and to hang it onto that. That is all that you can get out of this 3-page motion and comment, and [113] that is all that Mr. Rose could get out of it when he came to drawing his specifications and grounds on appeal.

As I pointed out in our memorandum, I got those out and read them and he says, referring to that point, that the indictment has been procured solely on hearsay evidence as reflected by the record, and citing back to this motion. And in his specification 8, on the grounds of appeal, he says that the court

erred in refusing to grant the defendant's motion to quash the indictment on the grounds that the same was procured solely on hearsay and incompetent evidence.

So whenever he who drew this—he didn't draw it—who made orally this motion to quash had occasion to interpret it when he was asking the higher court to review the lower court's decision on it, and he didn't breathe into it what he breathes into it today, that it was a broad attack.

The Court: I see your point. [114]

* * *

The Court: I gave consideration to the case of *Musser v. Utah* and the Supreme Court's statement in there about some whisper of a suggestion made in the lower court was actually raising a point.

Mr. Rose: I know that, your Honor. In fact, you called my attention to that case. It had just come down and I didn't even know of its existence. Your Honor knows I don't beat around the bush. I didn't know about it.

The Court: I could not find that in the record here.

Mr. Rose: Well, your Honor, if you will consider the scope of my objection, I said that the grand jury was an illegal body, I said that this indictment had been procured contrary to the statutes and the laws of the United States and the Constitution and everything else.

The Court: Not that the indictment had been procured. I think what you were complaining about

then—I set it up in my memorandum, your specific statement. [129]

Mr. Rose: I am quite sure that I used the word “indictment.”

The Court: You say: “I address to your Honor a motion to quash the indictment on the grounds that the same is procured contrary to the laws of the United States in violation of the constitutional provisos, namely, due process, the equal protection of the law and the statute in cases concerning the subject of requisite evidence and character evidence _____”

Mr. Rose: “And.” Note the “and.”

The Court: Had you stopped at “the equal protection of the laws and the statute in cases,” if you had stopped there maybe under the case of *Musser v. Utah* the Supreme Court might have held, or I would be justified in holding, that you had raised every possible and conceivable charge. But you did not.

Mr. Rose: I will agree with the court if that “and” wasn’t there.

The Court: You said “those constitutional provisions and statutes relating to the evidence and the character of the evidence.”

Mr. Rose: I said “and.” In other words, your Honor will have to concede that when I make an objection I make it broad enough. I have “and” there.

The Court: “Concerning the requisite evidence and character [130] of evidence.”

Mr. Rose: I say “and.”

The Court: You were aiming your objection at the nature of the evidence.

Mr. Rose: No, your Honor. If you choose to, and apparently you have—and I am not saying this critically—you can argue that. I mean, you can deduce that deduction from it. But the point is, in the light of the policy of the Supreme Court of the United States in the *Musser* case, where they say the slightest suggestion was sufficient for them to take hold of the issue, in the light of that policy your Honor will have to admit that I have an argument there of some kind. Certainly in the light of Mr. Justice Denman's views as I just indicated, where he goes so far as to say that even the court shouldn't have taken the plea of guilty to this man having been indicted by that type of jury, that he should have advised him of his right to dismiss.

Now, then, these are pronouncements that have been made since, your Honor, this case was argued.

The Court: I gave consideration to that fact too, and discussed the matter.

Mr. Rose: Now your Honor's view in a sense I can appreciate, you are sitting here as a trial court and you state—and I will have to respect that as a proper judicial attitude—you take the position that if there is any merit [131] to this thing the Circuit or some higher court, some Circuit having entertained this appeal, should entertain these contentions.

The Court: No, I do not take that position. My position is that I have decided the law as I see it.

Mr. Rose: Very well. [132]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of January, A.D., 1948.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed Feb. 1, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The above-named petitioner, Jacob Morris Danziger, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decision and judgment discharging the writ issued in the above-entitled proceedings, and in which matter findings of fact and conclusions of law were filed on the 9th day of July, 1948, and judgment was

entered as reflected in Book No. 51 at page 726 of the records of the above-entitled Court.

/s/ JACOB MORRIS DANZIGER,
Petitioner,

/s/ A. BRIGHAM ROSE,
Attorney for Petitioner.

Service acknowledged July 14, 1948.

[Endorsed]: Filed July 14, 1948.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 51, inclusive, contain the original Petition and Order for Writ of Habeas Corpus; Writ of Habeas Corpus; Return to Writ of Habeas Corpus; Traverse to Return to Writ of Habeas Corpus; Memorandum Opinion and Order; Findings of Fact and Conclusions of Law; Order Discharging Writ of Habeas Corpus and Remanding Petitioner to Custody; Notice of Appeal; Statement of Points to be Relied Upon on Appeal; Designation of Contents of Record on Appeal and Order Extending Time for Docketing Appeal, which, together with original reporter's transcript of proceedings on February 2, March 1 and 2 and July 26 and 27, 1948, and copy of Transcript of Record in Four Volumes in the United States Circuit Court of Appeals for the Ninth Circuit entitled Jacob Morris

Danziger et al vs. United States of America, No. 10989 and Supplemental Transcript of Record in the Supreme Court of the United States entitled Jacob Morris Danziger vs. United States of America on Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 17th day of February, A.D., 1949.

EDMUND L. SMITH,
Clerk,

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12189. United States Court of Appeals for the Ninth Circuit. Jacob Morris Danziger, Appellant, vs. Robert E. Clark, United States Marshal, Southern District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 18, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12,189

In the Matter of:

THE PETITION OF JACOB MORRIS DAN-
ZIGER for a Writ of Habeas Corpus in Pro-
ceedings herein numbered 12,189 entitled "Dan-
ziger vs. Clark," etc.

STATEMENT OF POINTS ON WHICH PETI-
TIONER AND APPELLANT, JACOB MOR-
RIS DANZIGER, INTENDS TO RELY,
AND DESIGNATION OF RECORD.

To Paul P. O'Brien, Clerk of the above entitled
court, and to James M. Carter, United States
Attorney for the Southern District of Cali-
fornia, Central Division:

Please Take Notice that the above named peti-
tioner and appellant, Jacob Morris Danziger, on his
appeal in this cause, intends to rely upon the fol-
lowing points, to-wit:

I.

That the law requires that the judge hearing an
application for a writ of habeas corpus must for
himself determine whether there was a denial of due
process in violation of the constitutional rights
guaranteed to an accused.

II.

That it was the duty of the judge in the District
Court to examine the entire record to determine

whether there was any evidence in the record to sustain the conviction regardless of the opinion of the Court of Appeals.

III.

That the judge of the District Court erroneously invoked the doctrine of *res adjudicata*.

IV.

That it was the duty of the judge hearing the matters on habeas corpus herein to decide for himself whether the petitioner had been validly indicted, and to determine the distinction between waiver of a speedy trial and waiver of arraignment, the latter claimed by petitioner to be jurisdictionally requisite.

V.

It was error of the judge in the District Court to disregard the undisputed evidence that in the opinion rendered by the Court of Appeals in the case of *United States vs. J. M. Danziger*, No. 10,989, the Court in its decision was not considering the true affidavit established of record for a continuance.

VI.

It was error for the District Court to assume that the petitioner was barred from establishing his denial of due process and to have his contentions heard respecting his deprivation of his constitutional rights in the hearing on habeas corpus, on the assumption that the manifest declaration in the Court of Appeals opinion was to the effect that

they had considered all other points and that they had no merit. See the issues raised in the petition for the writ, the traverse to the return, and opinion of Judge Peirson Hall filed March 18, 1948.

VII.

It was error for the District Court to adopt the restricted and super-technical theory that petitioner's motion to quash the indictment would have been well grounded if his counsel had stopped at a particular point in his objection and not added thereto.

VIII.

The District Court erred in considering the attack on the original trial judge's demeanor in the manner in which he tried the case, as expressed by his views reflected in the transcript filed on March 4, 1945, wherein at a hearing not attended by petitioner or his counsel said trial judge confessed that he had proceeded to try the case on the theory that the defendant had virtually pleaded guilty.

IX.

It is the contention of petitioner that the District Court was obliged to consider the habeas corpus proceeding in the light that the validity of conviction for crime is not restricted to those cases where the judgment was void for want of jurisdiction; that such proceedings embrace a consideration of the issue as to whether the conviction has been procured in disregard of the constitutional rights of the accused.

X.

The District Court erred in its failure to recognize that an attack on jurisdiction can be raised at any time.

XI.

The District Court erred in failing to recognize that where the indictment and proceedings are invalid, and where it appears that the defendant had been denied due process of law, it was the duty of the District Court to determine this contention on the record and the facts presented, as distinguished from assuming that the Court of Appeals decision and denial of certiorari in the United States Supreme Court were binding and conclusive and, therefore, barred an inquest in the validity of the proceedings.

XII.

The District Court erred in failing to find that petitioner herein had in his original case been coerced into waiving a trial by jury because of the unusual circumstances that were acknowledged to exist by the trial judge at the time of the commencement of the trial.

XIII.

The District Court erred in failing to make Findings.

DESIGNATION OF RECORD

You, and Each of You, Will Further Take Notice, that the petitioner and appellant, Jacob Morris Danziger, designates the parts of the record which he believes necessary to a consideration of the aforementioned Points on which he intends to rely on appeal, as follows:

(1) The application for the writ of habeas corpus, dated December 1, 1947.

(2) The order granting the writ, dated December 1, 1947.

(3) The return to the writ dated January 1, 1948.

(4) The traverse to the return, dated January 12, 1948.

(5) The remarks of the Honorable Claude McCulloch made at the hearing held March 4, 1945, and filed in this cause.

(6) The opinion of Judge Peirson M. Hall filed March 18, 1948.

(7) The order discharging the writ of habeas corpus.

(8) That portion of the certified typewritten transcript of the official court reporter, as follows:

Page 2, line 11, to page 10, line 11;

Page 12, line 10, to page 13, line 20;

Page 17, line 10, to page 18, line 6;

Page 23, line 2, to page 54, line 9;

Page 58, line 3, to line 16;

Page 60, line 11, to line 20;

Page 60, line 23, to page 67, line 13;

Page 72, line 1, to page 92, line 25;

Page 98, line 2, to page 114, line 16;

Page 129, line 9, to page 132, line 6.

Notice of Appeal and Clerk's Certificate.

(9) The petitioner designates that the official record which was originally received by the Court of Appeals and presented to the Court at the occasion of the hearing of the habeas corpus proceeding be referred to.

It should here be noted that the Court of Appeals originally granted petitioner permission to refer to the original exhibits received at the time of trial and did not require the same to be made a part of the printed record.

/s/ A. BRIGHAM ROSE,

Attorney for Petitioner and
Appellant.

Affidavit of Service by mail attached.

[Endorsed]: Filed June 13, 1949.

No. 12189

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JACOB MORRIS DANZIGER,

Appellant,

vs.

ROBERT E. CLARK, United States Marshal, Southern
District of California,

Appellee.

Appeal from the United States District Court for the
Southern District of California
Central Division

APPELLANT'S OPENING BRIEF.

A. BRIGHAM ROSE,

408 South Spring Street, Los Angeles 13, California,

Attorney for Appellant.

FILED

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No. 12189

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACOB MORRIS DANZIGER,

Appellant,

vs.

ROBERT E. CLARK, United States Marshal, Southern
District of California,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of the Case.

The case is here upon an appeal from an Order discharging a Writ of Habeas Corpus entered in the District Court of the United States for the Southern District of California, Central Division, as will appear from the transcript of the record on appeal (p. 37).

This Honorable Tribunal on the 23rd day of April, 1947, caused to be filed a decision in a case on appeal by Appellant herein, from a judgment rendered following a conviction of Appellant in a criminal proceedings had which is numbered in this Court 10,989, to which reference is hereby made.

At the time of the rendition of the decision rendered in said cause 10,989, the law appertaining to the legal

propriety of a part of the proceedings taken against Appellant herein, had not crystalized in that the all important decision in the case of *Ballard v. United States* originally reported in 152 F. 2d 941, had not come to the attention of Appellant herein in time to urge the grounds therein reflected, as voiding the trial under circumstances identical to those existing at the time of the return of the indictment as against Appellant, and it further became apparent that the learned justice, the author of the opinion rendered in action 10,989 was not mindful of *the actual grounds presented for a continuance* of the proceedings reviewed in said cause, as well as the facts that backgrounded and derogated the *waiver* of trial by jury, all in disregard of the constitutional rights of Appellant in said cause secured to him in order that it might be held that he had had the kind and manner of trial required under the laws of the United States.

Some of these factors were presented to this Honorable Court in a petition for a rehearing, which was denied without comment. The Appellant herein thereupon petitioned the Supreme Court of the United States for a Writ of Certiorari, which Writ was not granted.

Following the denial of Certiorari Appellant discovered a statement made in the record by the trial judge, not known to Appellant at the time he was prosecuting his appeal or petition for Writ of Certiorari, to the effect that the trial judge had virtually proceeded in the cause formerly reviewed by this Court in action 10,989 on the theory that the defendant, to wit, the Appellant in this cause, had virtually entered a plea of guilty.

Appellant accordingly applied to the United States District Court for the Southern District of California, Central Division, for a Writ of Habeas Corpus, a copy

of the said petition appears in the transcript of record, which will hereafter be designated as Tr., at pages 2 to 10. On December 1, 1947, the Court directed the Writ to issue [*id.* pp. 12, 13]. Thereafter a return by Appellee to said writ was made which return in effect referred to the former proceedings had in this Court, cause No. 10,989. The petition for Certiorari to the Supreme Court thereafter, and the coming down of the mandate [*id.* pp. 14-15].

To this return the Appellant filed a traverse [*id.* pp. 18-26]. Pursuant to the issues raised by the traverse the writ was ordered discharged on the 8th day of July, 1948 [*id.* p. 37].

Appellant herein, following the order discharging the writ, filed his notice of appeal to this Honorable Court [*id.* p. 122].

Jurisdiction.

This Court has jurisdiction of the within appeal by reason of the provisos of 28 U. S. C. Section 1291 and Section 2253, as well as the memorandum filed in this cause on December 14, 1948, to the effect that "We hold that the appeal is not moot and that the parties may proceed in the prosecution of the appeal."

Statement of Facts

The entire record of the proceedings originally presented for review in this Honorable Court in the matter numbered 10,989 was presented in this habeas corpus proceeding to the trial court as well as all of the briefs. The trial court's attention in this habeas corpus hearing was called to the *true* affidavit for a continuance which was neither considered by this Court in the former pro-

ceeding or by counsel for the government until after the decision rendered. [See Tr. pp. 40, 56.]

For the first time then it was established of record, that Appellant was arrested by a United States Marshal in 1941, and that no arraignment of said Appellant had taken place until some three years subsequent [*id.* p. 110]. The remarks of the original trial judge to the effect that he had been proceeding on the assumption that a verdict of guilty had been entered, was lodged with the court below at the hearing on this writ. These remarks were made on the 4th day of March, 1945, and constitute (5) in the designation of the record [Tr. p. 129].

The trial court erroneously in the habeas corpus proceedings declared: "If such statement indicated error on the part of the Trial Judge during the trial, surely the petitioner waived it when he did not either include it as an assignment of error, or even bother to print it in the record on appeal, of which, incidentally, there were over 1800 printed pages. * * *" The court below was apparently overlooking the fact that these comments of the trial court were matters to which Appellant and his counsel were not previously privy. The record will show that neither were present nor informed of said observation in time to present them to the appellate Tribunal.

The memorandum Opinion of the Honorable Pierson Hall, the Judge who granted and subsequently discharged the writ of habeas corpus culminating in this appeal, has submitted a written Memorandum of Opinion which is of particular significance in the consideration of this appeal, which Opinion appears in Tr. pages 26-36. The

said trial court admits as per record [*id.* p. 42] that he would not have decided that the arraignment of the defendant was according to law but that he could not review on habeas corpus, former rulings. Said Court further admitted that there is no doubt that the challenge to the grand jury on the ground of exclusion of women was a valid challenge if not waived [*id.* p. 77].

The Court additionally stated as follows:

“Whatever the boundaries are of the power of a District Court under the writ of habeas corpus (See *Sunal v. Large*, 332 U. S. 175, and its dissents, for a general discussion of the necessity of keeping such boundaries flexible) it cannot be said that there lies within such boundaries the power of a United States District Court to act as a reviewing court on a habeas corpus proceeding to both the Circuit Court of Appeals and the Supreme Court on matters and things previously considered and decided by such Appellate Courts on appeal in a specific case. And that is what the petitioner here asks, with a view to getting a different result, which amounts to a request for a reversal by the District Court of both the Circuit Court of Appeals and the Supreme Court.”

ARGUMENT AND AUTHORITIES.

POINT I.

The Court Was in Error in Applying the Doctrine of Res Adjudicata. The Court Below Indicated Clearly That It Was Bound by the Previous Determination.

However, this is directly contrary to the law as established by the following noteworthy decisions:

Owen v. Johnston, 306 U. S. 19;

Hawke v. Olson, 326 U. S. 271;

Ex parte Mayfield, 141 U. S. 107;

Moore v. Dempsey, 67 L. Ed. 543;

Marmo v. Rayan, 92 L. Ed. 204.

The use of the Writ of Habeas Corpus is not restricted to cases where the judgment is void for want of jurisdiction but extends to all matters where the conviction is had in disregard of Constitutional rights of the parties in question. See *Whaley v. Johnson*, 86 L. Ed. 1303.

POINT II.

The Failure to Arraign the Appellant for a Period of Three Years After His Indictment Was Fatal Insofar as It Conferred Jurisdiction in the Court Below.

It is manifest and apparent that there has been confusion between the difference between arraigning a defendant, and, *after* his arraignment bringing him to trial.

In this case there was a failure to arraign which was a violation of 18 U. S. C. A. 595.

This process is fundamentally requisite before a trial may be deemed to be had as required by the laws of the United States. This Court has recognized that, in *Runnells v. United States*, 138 F. 2d 346; *U. S. v. Haupt*, 136 F. 2d 661; and cases therein cited. See *Crane v. U. S.*, 40 L. Ed. 1097; *Rodriguez v. U. S.*, 49 L. Ed. 994.

POINT III.

The Point Expressed by the Trial Court That Had Appellant's Counsel Stopped at a Particular Point in Raising His Objection in Respect to the Motion to Quash the Indictment, Is Without Merit.

The record reflects that the Court recognized the importance of the objection to jurisdiction interposed by Appellant, and states that the objection in the form in which it was couched by reason of an addenda nullified the form of the objection. It is respectfully submitted that this is not the policy of the law of the United States. The case of *Musser v. Utah*, 333 U. S. 95, repudiates this doctrine.

Furthermore, in the *Rodriguez* case, 49 L. Ed. 994, it was stated the objection to jurisdiction where the grand jury was improperly impaneled may be raised at any time. In this connection it may not be amiss to point to the case of *Zapp v. U. S.* reported in 91 L. Ed. 688. In this cause a second petition for rehearing in the Supreme Court was granted at which time the Court, apparently on its own motion, although not urged previously in the motion for dismissal of the indictment, based on the holding in the *Ballard* case, disposed of the cause.

Conclusion.

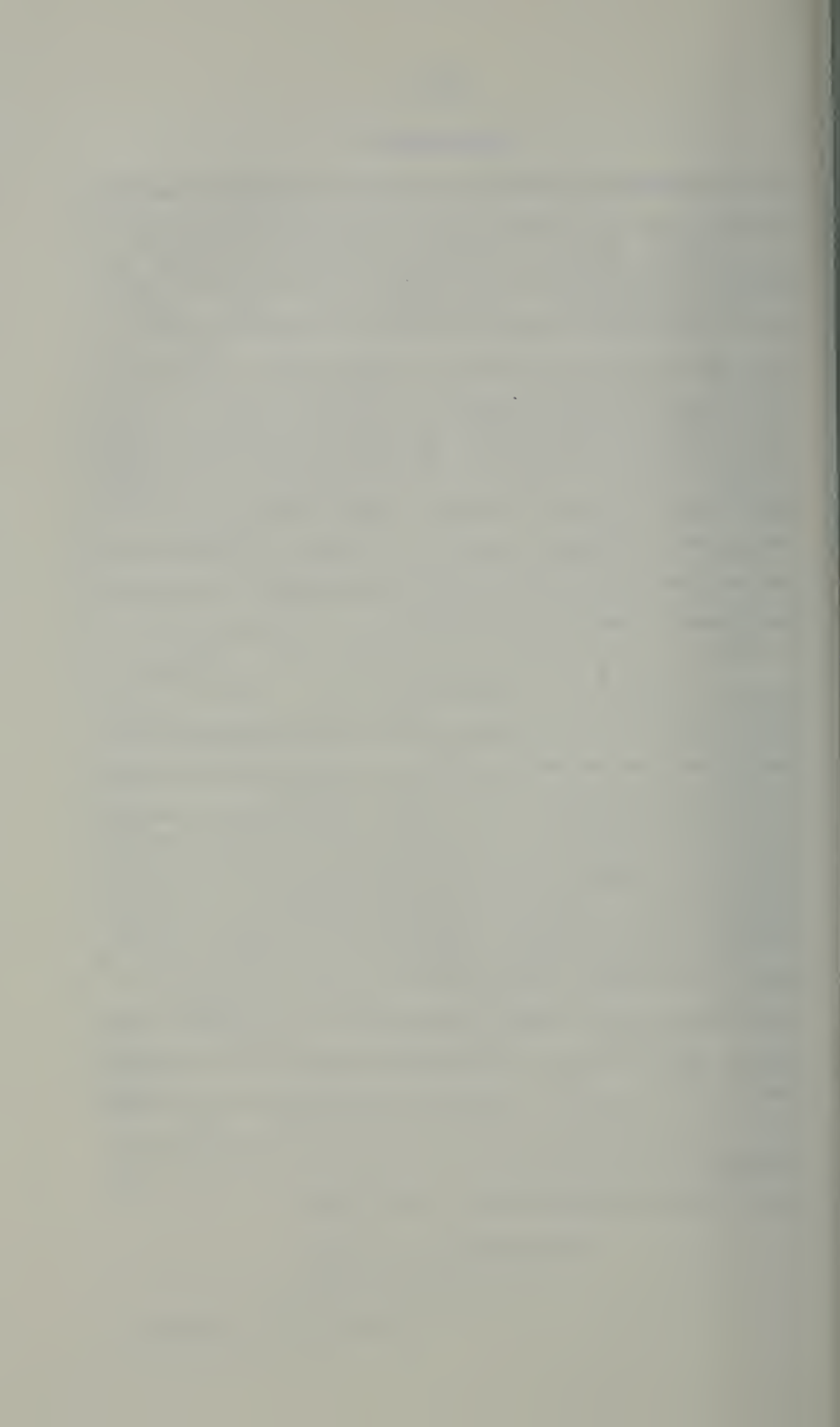
It is respectfully submitted that the record of the proceedings had in respect to the indictment and conviction of Appellant herein were had in violation of the now definitely established requirements under the Constitution of the United States. There was no arraignment as required by law; there was no opportunity afforded the Appellant to produce witnesses in his own behalf; he was coerced into waiving trial by jury; the trial judge, as now established by the record, was proceeding on a theory that a plea of *guilty* had been entered although the defendant had definitely pleaded not guilty; Appellant was indicted by a grand jury that was illegally constituted; his former appeal was decided on a misapprehension of the facts of record and in disregard of the existence of matters affecting the fundamentals of a fair trial; and finally the trial court below with this information, did accept the proceedings previously had, as being bound by the former rulings and finally, Appellant's contention in the court below was not that there was insufficient evidence to support his position, but that there was NO evidence and it thereupon became incumbent in the proceedings had on habeas corpus for the trial court to decide for himself whether there was ANY evidence.

For the reasons herein appearing it is respectfully submitted that the order discharging the writ of habeas corpus herein granted should be annulled and set aside with direction that the writ be granted and Appellant discharged on the grounds that his conviction was in violation of the fundamental law of the land.

Respectfully submitted,

A. BRIGHAM ROSE,

Attorney for Appellant.



United States
Court of Appeals
for the Ninth Circuit

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Territory of Hawaii

FILED

APR 29 1949

PAUL P. O'BRIEN,

United States
Court of Appeals
for the Ninth Circuit

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Territory of Hawaii

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For the Plaintiff,

VICTOR J. VEATCH,
HYMAN M. GREENSTEIN,
501 Merchandise Mart Bldg.,
Honolulu, T. H.

For the Defendant,

WILLIAM BORTHWICK,
SMITH, WILD, BEEBE & CADES,
By J. EDWARD COLLINS,
Bishop Trust Bldg.,
Honolulu, T. H. [2]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the
District of Hawaii

Civil No. 871

VICTOR J. VEATCH,

Plaintiff,

vs.

WILLIAM BORTHWICK,

Defendant.

CLERK'S STATEMENT

Time of Commencing Suit: September 4, 1948.
Complaint filed.

Names of Original Parties: Victor J. Veatch,
Plaintiff; William Borthwick, Defendant.

Dates of Filing Pleadings: December 20, 1948. Mo-
tion to Dismiss and Citations in Support Thereof.
January 11, 1949, Decree Dismissing Complaint.

Proceedings in the above-entitled matter were had
before the Honorable J. Frank McLaughlin, Judge,
United States District Court, District of Hawaii.

Dates of Filing Appeal Documents:

January 14, 1949: Notice of Appeal, Bond for
Costs on Appeal.

January 17, 1949: Designation of Record and
Statement of Points on Appeal. [3]

CERTIFICATE OF CLERK TO THE
ABOVE STATEMENT

United States of America,
Territory of Hawaii—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause, the names of the original parties, the dates when the respective pleadings were filed and the name of the judge presiding, and the dates when appeal pleadings were filed in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of February, 1949.

/s/ WM. F. THOMPSON, JR.

Clerk, United States District
Court, District of Hawaii. [4]

[Title of District Court and Cause.]

COMPLAINT

To the Honorable, the Presiding Judge of the United States District Court for the District of Hawaii:

Comes now Victor J. Veatch, plaintiff above named, by Hyman M. Greenstein, his attorney, and complaining of the defendant above named respectfully represents to this Honorable Court as follows:

1. That plaintiff is a citizen of the State of Colo-

rado, temporarily residing and working on Hickman Field, a military reservation of the United States.

2. That William Borthwick, Defendant, is a citizen of the Territory of Hawaii, and at all times complained of herein was, and still is the Tax Commissioner of the Territory of Hawaii; but that said defendant is not sued herein in such official capacity but simply in his individual capacity.

3. That the amount in controversy exceeds \$3,000.00, exclusive of interest and costs; and that this suit is filed under Section 1332 of Title 28, United States Code, Judiciary and Judicial Procedure (Public Law 773, Laws of the 80th Congress, Second Session). [6]

4. That the plaintiff herein is defendant in a certain case pending in the Courts of the Territory of Hawaii wherein the constitutionality of the 2% Compensation and Dividends Tax Law is involved.

5. That an appeal in said case is presently being perfected to the United States Circuit Court of Appeal for the Ninth Circuit; but that during the pendency of said case and until its final disposition, plaintiff and hundreds of persons similarly situated have been engaged in paying various tax moneys into a special escrow or protest fund with said defendant and his agents and employees until the final disposition of said case.

6. That in order to expedite such protest payments, the plaintiff has been bringing in various moneys and signed returns and appeal forms on behalf of various other taxpayers, similarly situated as himself, being duly authorized thereunto by said

other taxpayers, into the office of the said tax Commissioner, making such visits and payments about once a week.

7. That plaintiff is a good, true, honest, just and faithful person, and until the committing of the grievances by the said defendant as hereinafter set forth, was always reputed, esteemed and accepted by and among all his neighbors, and residents to whom he was in anywise known, to be a person of good name, fame, credit and reputation.

8. That the said plaintiff has not ever been guilty of or until the time of the utterance of the several false, scandalous, malicious and defamatory words by the said defendant, as hereinafter mentioned, been suspected to have been guilty of such matters as is hereinafter referred to. [7]

9. That on the 28th day of August, 1948, plaintiff appeared with other taxpayers in the office of the defendant to discuss the payment under protest of several taxpayers but that during the course of the conversation, and intending to injure the plaintiff, the said defendant did falsely and maliciously in the presence and hearing of other persons, utter the following false and defamatory matter concerning the plaintiff;

“Veatch—I don’t mind telling you to your face, that you are nothing but a crook and trouble-maker, and that you are making a good shake down on the people that are fighting the tax—you would not be fighting the tax if you were not getting a rake off,”

or words to that effect; thereby meaning and implying that plaintiff was and is cheating taxpayers in the federal areas, for whom he has been acting as agent; and that said persons in whose hearing said defamatory words were so spoken by defendant then and there understood that such was the meaning of said words.

10. That as a result of the utterance of the said false, and defamatory matter plaintiff has suffered public hatred, shame, contempt and ridicule, and has been injured in the sum of Fifty Thousand Dollars (\$50,000.00).

11. Plaintiff further states that such utterance was wilfully, deliberately and maliciously made and with the intent and purpose of intimidating the plaintiff into abandoning his pending case wherein the constitutionality of the tax law, as aforesaid, is involved, and that by reason thereof, plaintiff is entitled to punitive damages in the premises. [8]

Wherefore, plaintiff prays for judgment against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00) as general damages; and the further sum of Fifty Thousand Dollars (\$50,000.00) as and for punitive or exemplary damages.

Dated at Honolulu, T. H., this 30th day of August, 1948.

/s/ VICTOR J. VEATCH,
Plaintiff.

/s/ HYMAN M. GREENSTEIN,
Attorney for Plaintiff.

Territory of Hawaii,
City and County of Honolulu—ss.

Victor J. Veatch, being first duly sworn on oath, deposes and says: That he is the plaintiff named in the foregoing Complaint, that he has read the same; knows the contents thereof, and that the same is true in substance and in fact.

/s/ VICTOR J. VEATCH.

Subscribed and sworn to before me this 30th day of August, 1948.

(Seal) /s/ ROSE I. PAVAO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires January 22, 1951.

[Endorsed]: Filed Sept. 4, 1948. [9]

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Hyman M. Greenstein, plaintiff's attorney, whose address is 501 Merchandise Mart Building, Honolulu, T. H., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal) /s/ WM. F. THOMPSON, JR.,
Clerk of Court.

Date: September 4, 1948. [10]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 4th day of September, 1948, I received the within summons and on the 28th day of October at 9:30 a.m. of said date, I executed the same by handing to and leaving with William Borthwick at his office at the Territorial Tax Office, Honolulu, T. H., a certified copy of Summons, together with a copy of the Complaint attached thereto.

Marshal's Fees: Travel, \$.06; Service, \$2.00; Total \$2.06.

/s/ OTTO F. HEINE,
United States Marshal.

[Title of District Court and Cause.]

MOTION TO DISMISS

To the Honorable the Presiding Judge of the Above Court:

Comes now William Borthwick, defendant in the above-entitled cause, by Smith, Wild, Beebe & Cades, his attorneys, and moves the court as follows:

1. To dismiss this action on the ground that there has been a failure by the plaintiff in his complaint to state a claim upon which relief can be granted;

2. In compliance with Rule 2(a) (2) of the Rules of Civil Procedure for the United States District Court for the District of Hawaii, there is attached hereto and made a part hereof, citations of authorities in support of this motion.

Wherefore the defendant prays that the plaintiff's suit be dismissed.

Dated: Honolulu, T. H., December 20, 1948.

WILLIAM BORTHWICK,
Defendant,

By SMITH, WILD, BEEBE &
CADES,

By /s/ J. EDWARD COLLINS,
His Attorneys. [12]

CITATIONS

In an action of slander, no recovery may be had without proof of special damages in the absence of alleged language on the part of the defendant im-

puting to the plaintiff: (1) the commission of a crime; (2) a loathsome disease; (3) defamation with respect to the conduct of a business, trade, or office; or (4) unchastity. The complaint fails to meet any of these requirements, and, therefore, does not set out a crime upon which relief can be granted.

Hofstadter v. Bienstock, 208 N.Y. Supp. 453;
(1925);

Gaare v. Melbostad, 242 N.W. 466; (1932);

Fausett v. Clark (1878) 48 Md. 494; 30 Am. Rep.
48;

Morrisette v. Beatte, (1941 R. I.), 17 Atl. (2d)
464;

Nelson v. Rosenberg (1938 Neb.), 280 N.W. 229;
Farley v. Bufkin, (1931 Miss.), 132 So. 86;

Ringgold v. Land (1937 N.Car.), 193 S.E. 267;

Boyle v. MacDougall, 218 N.Y. Supp. 285;
(1926);

Eisenberg v. Reasenberg, 231 N.Y. Supp. 49;
(1928);

[Endorsed]: Filed Dec. 20, 1948. [13]

In the United States District Court for the
Territory of Hawaii

Civil No. 871

VICTOR J. VEATCH,

Plaintiff,

vs.

WILLIAM BORTHWICK,

Defendant.

DECREE DISMISSING COMPLAINT

It appearing this 11th day of January, 1949, that the motion of the defendant above named to dismiss the complaint herein on the ground that it failed to set forth a cause of action upon which relief could be granted came on for hearing and was argued by counsel on the 29th day of December, 1948, and said motion to dismiss was granted with leave to the plaintiff to amend the complaint within ten days thereafter, and the plaintiff not having within ten days thereafter amended the aforesaid complaint;

It Is Hereby Ordered, Adjudged and Decreed that said complaint herein be and the same is hereby dismissed with prejudice.

Dated: Honolulu, T. H., this 11th day of January, 1949.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the
Territory of Hawaii.

[Endorsed]: Filed Jan. 11, 1949. [15]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Pursuant to Rule 73 of the Rules of Civil Procedure, notice is hereby given that Victor J. Veatch, plaintiff above named, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree entered on the 11th day of January, 1949, in the above-entitled cause and action dismissing the complaint filed herein on the ground that said complaint fails to set forth a cause of action upon which relief can be granted.

Dated at Honolulu, T. H., this 14th day of January, 1949.

/s/ HYMAN M. GREENSTEIN,
Attorney for Victor J. Veatch,
Plaintiff-Appellant. [17]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That Victor J. Veatch, as principal and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto William Borthwick, defendant, in the sum of \$250.00 for the payment of which well and truly to be made, said Victor J. Veatch as principal and United States Fidelity and Guaranty Company, as surety, do bind

themselves, their respective heirs, executors, administrators, successors and assigns, jointly and severally, and firmly by these presents.

The Condition of This Obligation Is Such That:

Whereas the above bounden principal, Victor J. Veatch, has filed his notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order entered in the above-entitled cause dismissing said action:

Now, Therefore, if the said principal shall prosecute said appeal with effect and answer all costs if he fails to [18] sustain said appeal, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, said Victor J. Veatch has hereunto set his hand, this 14th day of January, 1949.

/s/ VICTOR J. VEATCH,
Principal.

UNITED STATES FIDELITY
AND GUARANTY CO.,

By CALVERT G. CHIPCHASE,
Surety, Its Attorney-in-fact.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 14th day of January, 1949, before me personally appeared Victor J. Veatch, to me known to be the person described in and who executed the

foregoing instrument, and acknowledged that he executed the same as his free act and deed.

(Seal) /s/ ROSE I. PAVAO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires January 22, 1951.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 14th day of January, 1949, before me personally appeared Calvert G. Chipchase, to me personally known, who being by me duly sworn did say that he is the Attorney-in-Fact of the United States Fidelity and Guaranty Company, duly appointed under Power of Attorney dated the 29th day of January, 1948, which Power of Attorney is now in full force and effect, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation under the authority of its Board of Directors and said Calvert G. Chipchase acknowledged said instrument to be the free act and deed of said corporation.

 /s/ WILLIAM B. STEVEN,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [19]

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD ON
APPEAL

Comes now Victor J. Veatch, plaintiff-appellant, in the above-entitled matter, by and through his attorney Hyman M. Greenstein, does hereby designate the following portions of the record to be contained in the record on appeal:

1. Complaint and Summons;
2. Defendant's motion to dismiss, dated December 20, 1948;
3. Decree dismissing complaint;
4. Notice of appeal;
5. Bond for costs on appeal;
6. Designation of the record on appeal;
7. Statement of points on appeal.

Dated at Honolulu, T. H., this 17th day of January, 1949.

VICTOR J. VEATCH,
Plaintiff,

By /s/ HYMAN M. GREENSTEIN,
His Attorney.

[Endorsed]: Filed Jan. 17, 1949. [21]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now Victor J. Veatch, plaintiff-appellant, in the above-entitled matter, by and through his attorney, Hyman M. Greenstein, does hereby designate the following statement of points on which he intends to rely on the appeal: The trial court erred in dismissing the complaint on the ground that it failed to set forth a cause of action upon which relief could be granted.

Dated at Honolulu, T. H., this 17th day of January, 1949.

VICTOR J. VEATCH,
Plaintiff,

By /s/ HYMAN M. GREENSTEIN,
His Attorney.

[Endorsed]: Filed Jan. 17, 1949. [22]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Hawaii—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing pages numbered 1 to 22, inclusive, are a true and complete transcript of the record and proceedings had in said court in the

above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are \$. and that said amount has been paid to me by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of February, 1949.

/s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii. [23]

[Endorsed]: No. 12190. United States Court of Appeals for the Ninth Circuit. Victor J. Veatch, Appellant, vs. William Borthwick, Appellee. Transcript of Record. Appeal from the United States District Court for the Territory of Hawaii.

Filed February 21, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12190

VICTOR J. VEATCH,

Plaintiff,

vs.

WILLIAM BORTHWICK,

Defendant.

DESIGNATION OF THE RECORD ON
APPEAL

Comes now Victor J. Veatch, plaintiff-appellant, in the above-entitled matter, by and through his attorney, Hyman M. Greenstein, does hereby designate the following portions of the record to be contained in the record on appeal:

1. Complaint and Summons;
2. Defendant's motion to dismiss, dated December 20, 1948.
3. Decree dismissing complaint;
4. Notice of appeal;
5. Bond for costs on appeal;
6. Designation of the record on appeal;
7. Statement of points on appeal.

Dated at Honolulu, T. H., this 17th day of January, 1949.

VICTOR J. VEATCH,
Plaintiff,

By /s/ HYMAN M. GREENSTEIN,
His Attorney.

STATEMENT OF POINTS ON APPEAL

Comes now Victor J. Veatch, plaintiff-appellant, in the above-entitled matter, by and through his attorney, Hyman M. Greenstein, does hereby designate the following statement of points on which he intends to rely on the appeal: The trial court erred in dismissing the complaint on the ground that it failed to set forth a cause of action upon which relief could be granted.

Dated at Honolulu, T. H., this 17th day of January, 1949.

VICTOR J. VEATCH,
Plaintiff,

By /s/ HYMAN M. GREENSTEIN,
His Attorney.

[Endorsed]: Filed Apr. 1, 1949. Paul P. O'Brien,
Clerk.



No. 12,191

IN THE

United States Court of Appeals
For the Ninth Circuit

PHILIP NELSON,

Appellant,

VS.

AMERICAN PRESIDENT LINES, LTD. (a
corporation), and UNITED STATES OF
AMERICA,

Appellees.

BRIEF FOR APPELLEE
AMERICAN PRESIDENT LINES, LTD.

TREADWELL & LAUGHLIN,

EDWARD F. TREADWELL,

REGINALD S. LAUGHLIN,

Mills Building, San Francisco 4, California,

Proctors for Appellee,

American President Lines, Ltd.

CHARLES M. HAID, JR.

Mills Building, San Francisco 4, California,

Of Counsel

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

PHILIP NELSON,

Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD. (a
corporation), and UNITED STATES OF
AMERICA,

Appellees.

**BRIEF FOR APPELLEE
AMERICAN PRESIDENT LINES, LTD.**

I.

STATEMENT OF THE CASE.

The S. S. RUTH ALEXANDER, owned and operated by Appellee, American President Lines, Ltd., opened shipping articles on October 21, 1941, covering a voyage from San Francisco westward to Manila and other trans-Pacific ports, and return to a Pacific Coast port of discharge. The vessel sailed from San Francisco and arrived at Manila on December 9, 1941. War between the United States and Japan broke out on De-

ember 7, 1941, and the vessel departed from Manila on December 28, 1941, en route to Australia, or any other safe place of refuge. On December 31, 1941, while proceeding through the Macassar Straits, the vessel was bombed and sunk by a Japanese plane. The crew members took to the life boats and were, on the same day, rescued by a Dutch seaplane which took them to Tarakan, Borneo. All the crew members, including Nelson, remained in Tarakan for about one day, and were then flown to Balikpapan, Borneo, where they remained another day. They were then taken by steamer to Soerabaya, Java, arriving about January 4, 1942. They remained in Soerabaya until about January 24, 1942, when all except Nelson departed by steamer and were repatriated to the United States, arriving during February 1942. From the time of his arrival in Soerabaya about January 4, 1942, until about January 18, or 19, 1942, Nelson was quartered in a rooming house with other crew members. He was then hospitalized in Soerabaya, and was unable to travel and leave with the others. The Japanese entered Java in March 1942, and Nelson was thereafter interned by the Japanese until September 1945, at which time the island was liberated and Nelson was repatriated to San Francisco, by way of New York, during October 1945.

After Nelson's arrival in San Francisco he was paid the net sum of \$3,937.65, this amount including wages of \$4,016.25 for the period January 1, 1942 to October 27, 1945, inclusive, at \$87.50 per month, plus \$6.40 as bonus during repatriation, plus

\$125.00 for transportation from New York to San Francisco, plus \$150.00 for loss of personal effects, less \$360.00 for prior advances.

II.

ISSUES.

Appellant seeks recovery against Appellee American President Lines, Ltd. of the following:

1. War bonus, in the amount of \$3,600.00, for the period of his internment, 45 months, at \$80.00 per month;

2. Maintenance or subsistence during internment, for the period December 31, 1941 until October 1, 1945, at \$3.75 per day, totaling \$5,118.75;

3. Maintenance after repatriation, for the period October 1, 1945, until approximately April 30, 1946, at \$5.00 per day, totaling \$935.00;

4. War risk insurance benefits, in the amount of \$5,000.00, because of personal injuries allegedly suffered during the bombing of the vessel, and internment subsequent thereto.

This brief will not discuss the matter of war bonus, it having been heretofore stipulated by and between the parties that payment or non-payment thereof shall be in accordance with the ultimate disposition of the same question heretofore considered by this court in the case of *Agnew et al. v. American President Lines, Ltd., a corporation, and United States of*

America, No. 11,943, amended opinion filed May 18, 1949, involving interned seamen ex the SS. PRESIDENT HARRISON. The said stipulation dated June 22, 1949, was filed on June 22, 1949.

Respecting maintenance or subsistence during internment, Appellant apparently seeks recovery on either of the following grounds:

1. Because he was injured during the course of his employment on the vessel; or

2. Because there is an implied provision in the shipping articles to pay maintenance for the same period of time for which wages are payable; or

3. Because there is an obligation on the part of the vessel under general maritime law to pay maintenance to her seamen after the loss of the vessel; or

4. Because the union agreement in existence at the time the articles were opened (Marine Cooks and Stewards Agreement, July 5, 1940, Section D, subsection 7) provides therefor. The agreement provides as follows (A. 4):

“D. Section 7. When in port and subsistence is not furnished, members of the Stewards Department shall receive seventy-five cents (75¢) per meal and when quarters are not furnished one dollar fifty cents (\$1.50) per day for room.”

American President Lines controverts each basis upon the grounds, respectively, that Nelson was not injured aboard the vessel in the course of his employment; that there is no implied obligation to pay

maintenance for the same period as that for which wages were expressly made payable; that there is no obligation under the general maritime law to pay maintenance to seamen of a lost vessel; and that the union agreement calls only for payment of subsistence during the course of a continuing voyage. The District Court, Judge Goodman, ruled in favor of Appellee American President Lines (Respondent below) in regard to non-payment of maintenance or subsistence.

Respecting maintenance after repatriation Appellant seeks recovery on the basis that he was injured during the course of his employment aboard the vessel and was still in need of treatment following his repatriation. American President Lines controverts the claim, and the District Court ruled in favor of Appellee American President Lines (Respondent below) in this regard.

Respecting war risk insurance benefits in the amount of \$5,000.00, because of personal injuries allegedly suffered during the bombing of the vessel, or internment thereafter, Appellant contends that the rider to the shipping articles required American President Lines to provide comprehensive and all inclusive war risk insurance covering injuries, internment, and death. The rider provides as follows (A. 36):

“8. War risk insurance in the sum of \$5,000.00 shall be furnished to members of the crew on this voyage in accordance with Agreements with Unions shown above.”

American President Lines controverts this claim on the basis that the rider to the shipping articles and the applicable union agreement required Appellee American President Lines to provide war risk insurance covering death only, and that such insurance was actually procured; and on the further basis that in any event Appellant did not incur any injuries at the time of the bombing of the vessel, or as a direct or proximate result thereof.

III.

STATEMENT OF THE EVIDENCE.

We briefly summarize the evidence presented to the District Court, as follows:

A. *For Appellant* (Libelant below):

Dr. Guterman, who examined Nelson during December, 1946, testified regarding various disabilities of the right wrist, right leg and ankle, and lower back (A. 119), and generally attributed the disabilities, on the basis of Nelson's history (A. 118), to trauma, although he was unable to state whether the healed fractures of wrist and ankle were five or ten years old (A. 131). He further stated that he was initially puzzled respecting the disability of the right leg (A. 125), so secured an abstract from the San Francisco Marine Hospital's clinical record regarding Nelson (A. 126), which revealed the disability could be attributed to paralysis following hemorrhage in the brain (A. 126, 127). A report was procured from the Army's 142nd

General Hospital, Calcutta, which revealed that Nelson had suffered paralysis involving his right leg, cause undetermined (A. 127). Dr. Guterman suggested four possibilities as the cause for Nelson's disabilities: Trauma, pressure on a nerve, brain hemorrhage, syphilis (A. 128). He had not originally considered vascular (hemorrhagic) causes because Nelson had not mentioned these matters to him. (A. 132).

Appellant, *Philip Nelson*, testified that during the bombing of the vessel he and other seamen, including Chief Mate Cox, were some four decks below the main deck (A. 141), when a bomb fell into the area, tearing up the vessel and causing injury to his right wrist, right ankle, and back (A. 142). He left the area, jumped overboard, and was picked up by the Master's lifeboat (A. 143). He received no treatment at Taranakan or Balikpapan, stops en route to Soerabaya (A. 158), and neither asked for nor received any treatment at Soerabaya because "I was tired and did not want to go to the hospital; * * *" (A. 145). At some later date, however, because he could not walk (A. 145), he called in a doctor who had him hospitalized (A. 159). A cast was put on his leg in the hospital and he remained there about two weeks before the Purser came to see him (A. 146). A cast was put on his hand after the Japanese occupied Soerabaya some time in March, 1942, some two months after the bombing of the vessel (A. 146, 147). The purser had made advances of money to Nelson by coming to Nelson's room (A. 160) prior to being hospitalized.

B. *For Appellee American President Lines* (Respondent below):

John Conway, Purser ex the SS. RUTH ALEXANDER, testified that all the crew members assembled on "D" deck at the time of the bombing (A. 174); that a bomb exploded on the deck above, collapsing a staircase, blowing out the lights, and injuring four seamen, but that the first time he heard of Nelson's allegedly having been injured was when the present suit was filed (A. 176). Special care was taken of injured seamen on the rescuing plane, but Nelson was not among the injured so cared for (A. 177, 178); nor was Nelson among those cared for at Balikpapan (A. 178); nor was he hospitalized at Soerabaya upon arrival (A. 179). Licensed personnel were quartered in one hotel, the majority of unlicensed personnel in another hotel, and several others, including Nelson, in a rooming house (A.180). Conway made cash advances on numerous occasions (A. 161) during the three weeks the seamen were in Soerabaya before their departure, payments being made at the crew's hotel (A. 180), and Nelson was not paid at his rooming house, but at the hotel (A. 181), the final payment being on January 23, 1942 (A. 161). A crew member informed Conway something had happened to Nelson, so Conway went to Nelson's room and found him in bed, unconscious (A. 182, 183). Nelson was then hospitalized (A. 183). Conway visited the hospital three times (A. 183, 194); the first two times, however, Nelson was unconscious, but the third time Conway spoke to Nelson, telling him the doctors said he was not physically

fit to travel with the balance of the crew who were being repatriated (A. 184). Conway did not at any of his three visits see any open wounds, scars, or casts on Nelson (A. 220, 221, 223). The official log of the vessel, dated January 27, 1942, written up by Conway, states that Nelson was left at Soerabaya, the doctors having pronounced him unfit to travel (A. 187).

Joseph Cox, Chief Mate ex the SS. RUTH ALEXANDER, testified that he was with the crew at the foot of the vessel's main staircase at the time of the bombing (A. 226); that to his knowledge Nelson was not injured in the bombing, although four other seamen were (A. 227); that Nelson was not among the injured cared for at Tarakan or Balikpapan nor was he among those hospitalized on arrival at Soerabaya (A. 227, 232). He saw Nelson on several occasions walking about during the three weeks the crew were at Soerabaya before being repatriated, and that there appeared to be nothing the matter with him (A. 227, 228, 232). As an incident to ship's business he knew that Nelson was hospitalized several days before January 24, 1942, when Cox was repatriated (A. 228, 229), but does not know of any treatment given Nelson (A. 230). The crew members given treatment were those observed by or reported to Cox as having been injured (A. 230, 231, 232).

Frederick Willarts, Master ex the SS. RUTH ALEXANDER, the only witness whose testimony was given by deposition, stated that after the bombing of the

vessel Nelson jumped into the water from the vessel, a distance of about 12 feet, and was pulled into the Master's life boat (A. 240, 241, 253); the Master inquired of Nelson respecting the existence of any injuries, and was informed by Nelson "I'm all right; I'm going to pull the oar", which he did (A. 240, 256); Nelson had no outward injuries, nor did he complain while in the lifeboat of any injuries (A. 240, 255, 256). There were four seamen out of a total of forty-eight who were treated at Tarakan, Balikpapan, and Soerabaya, and Nelson was not among them, nor did Nelson or anyone else ever report that Nelson was allegedly injured in the bombing (A. 242, 243, 244, 254, 256, 257, 258). After arrival at Soerabaya the seamen were housed in various places, as available (A. 244), and Nelson was seen thereafter for at least two weeks walking about the city, having no apparent difficulty with his leg or ankle (A. 259). On or about January 18 or 19, 1942, the Master and the Purser went to the place where Nelson was staying (A. 245, 246), found Nelson was ill, and had him transferred to a hospital (A. 247, 252), this transfer occurring perhaps a week before the balance of the crew departed from Soerabaya (A. 248). The Master was informed on January 27, 1942, that the hospital's doctors had pronounced Nelson unfit to travel, and a notation to that effect was made in the ship's logbook (A. 248, 249, 260), the Master further stating that Nelson, while in the hospital, looked physically all right, but had an expression like a drunken man going wild (A. 250), counsel for Nelson eliciting on cross-

examination that the hospital's doctors reported that Nelson had been drinking too much (A. 254).

Dr. Rodney A. Yoell, Chief Surgeon for American President Lines, testified that he examined Nelson on November 17 and 18, 1947, Nelson at that time complaining of pain in the right foot and right instep (A. 189), but making no complaint respecting his right hand or right arm (A. 189) nor respecting his back (A. 199). Nelson had been drinking at the time of both examinations (A. 190, 197). Dr. Yoell found from his examination that Nelson had venereal disease (A. 190), although Nelson stated he had never had any venereal disease (A. 196). Reference, while on the witness stand, to clinical records from the San Francisco Marine Hospital and the Army's 142nd General Hospital at Calcutta, revealed that both Kahn and Wasserman tests during 1945 were positive for the existence of venereal disease (A. 190, 191). Although a small scar was found on the foot, x-rays did not reveal evidence of a prior fracture (A. 190, 198). Dr. Yoell's diagnosis respecting the right leg was of an old hemiplegia (paralysis) of unknown cause (A. 192, 204), although trauma could have caused the condition (A. 203, 204). A clot on the brain or trauma were equally logical explanations of the leg condition (A. 205). People with venereal disease, who indulge in alcohol, are prone to vascular (hemorrhagic) disturbances (A. 195). Nelson's back was examined, but no limitation of motion was noted, nor any hypertension or guarding action of the back muscles (A. 199, 202).

In connection with the foregoing matters *Appellant* (Libellant below) again took the stand on his own behalf and testified that he had reported the injury to his foot to the Chief Steward and to the Purser (John Conway), but had asked the Purser not to report the condition because Nelson did not want to be hospitalized and left behind in Soerabaya (A. 275, 277). It was not until his foot allegedly became swollen that the Purser secured medical aid (A. 225). The Chief Mate, Mr. Cox, also knew of Nelson's having been injured, but, according to Nelson, "he wouldn't say anything about it today * * *" (A. 276). Nelson further testified "I have just been double-crossed all the way around" (p. 276). In answer to questions by Judge Goodman Nelson admitted that during the two weeks or more he was in Soerabaya following arrival and before being hospitalized he walked around on various occasions, "trying to exercise the foot" (A. 276, 277).

E. C. Kester, Manager of American President Lines Insurance Department, gave testimony concerning the matter of war risk insurance protection, stating that he was familiar (A. 262) with Paragraph 8 of the rider to the shipping articles (A. 36) which provided:

"8. War risk insurance in the sum of \$5,000 shall be furnished to members of the crew on this voyage in accordance with agreements with Unions shown above."

Kester procured a Lloyd's policy which provided that unlicensed seamen were covered against loss of life only (A. 263), but that the policy covered licensed

personnel for injuries as well as death (A. 264). The collective bargaining agreement dated July 5, 1940, with the Marine Cooks and Stewards union, as referred to in the contract, did not contain anything respecting war risk insurance, but the Supplement dated October 10, 1941, did so provide (A. 266, 273) as follows:

“Section 4. War risk insurance in the sum of \$5,000 shall be furnished to members of the crew of vessels on voyages provided for in this agreement.”

Over objection by Nelson's counsel the union agreement effective August 16, 1941, with the Masters, Mates and Pilots, was introduced into evidence (A. 270), Paragraph 5 of said agreement providing as follows:

“(5) War risk insurance of \$5,000 shall be furnished each Licensed Officer on voyages described in the above danger areas; such policy shall provide for the payment of the said sum of \$5,000 to the estate or designated beneficiary of such Licensed Officer in case of death due to war conditions or the payment of said sum to the Licensed Officer himself in the event of his total and permanent disability due to such war conditions, and shall provide for payment of any sum less than \$5,000 to which such Licensed Officer may be entitled for injury less than total or permanent disability resulting from said war conditions. Such policies shall be made available for inspection at the offices of the respective companies.”

Discussion was had between counsel for the parties and the Court respecting Paragraph 7 of the rider to the shipping articles (A. 35) and Section 4 of the Marine Cooks and Stewards' supplementary union agreement dated October 10, 1941, calling for reimbursement of crew members in the amount of \$150.00 in the event of loss of personal effects from war risks (A. 273).

Such evidence as may be pertinent to the issues involved will be further considered in relation to each issue in turn.

IV.

ARGUMENT.

The only real issue is one of fact respecting whether or not Appellant was injured during the course of the bombing of the vessel, or as a direct or proximate result thereof. If Appellant was not so injured he is not entitled to a recovery upon any of the causes alleged.

A.

THE FINDINGS OF FACT BY THE DISTRICT COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, ARE NOT CLEARLY ERRONEOUS, AND HENCE SHOULD NOT BE DISTURBED ON APPEAL.

It is recognized that although an appeal in admiralty opens the case for a trial *de novo*, findings of fact by the District Court are entitled to the greatest

weight. This Court has repeatedly stated that where the findings are supported by substantial evidence and are not clearly erroneous, the findings should not be disturbed.

Heder v. United States, 167 F. (2d) 899 (C.A. 9);

Bornhurst v. United States, 164 F. (2d) 789 (C.A. 9).

In this case all witnesses (except Frederick Wil-larts, Master, whose deposition was read on behalf of Appellee American President Lines), namely, two for Appellant (Libelant below) and five for Appellee American President Lines (Respondent below) testified in open court. This Court has ruled, under such circumstances, as follows:

“In an appeal in admiralty, where ‘a substantial part of the evidence was heard in open court’, the ‘correct rule’ is that the findings of the trial court ‘are accompanied with a rebuttal presumption of correctness.’ *Thomas v. Pacific S. S. Lines, Ltd.*, 9 Cir., 84 F. (2d) 506, 507, 508; *The Pennsylvania*, 9 Cir., 149 F. (2d) 478, 481. And, ‘where all of the evidence is heard by the trial judge and the question is one of credibility of the witnesses on conflicting testimony, the presumption [that the findings of the District Court are correct] has very great weight.’ ”

Tawada v. United States, 162 F. (2d) 615 (C. A. 9).

See also:

United States v. Lubinski, 153 F. (2d) 1013 (C.A. 9).

The reasons for such rulings are sound and need no recapitulation. Abrogation of the rules and the reasons behind them, as proposed by Appellant, is no more warranted in a seaman's case than it would be in any other case.

B.

APPELLANT IS NOT ENTITLED TO MAINTENANCE OR SUBSISTENCE DURING INTERNMENT FOR THE FOLLOWING REASONS.

1. The District Court found that Appellant was not injured during the course, nor as a proximate result, of his employment aboard the vessel;

2. The District Court ruled that the applicable union agreement provided only for subsistence during the course of a continuing voyage;

3. This Court has ruled that when a vessel is lost there is no obligation under the general maritime law to pay her uninjured seamen maintenance thereafter;

4. This Court has ruled that maintenance, although a form of compensation to seamen, is not part of their wages, and is not payable for such time as the express terms of the shipping articles may require as to wages.

1. Specifically, the District Court found (Finding of Fact No. 6, A. 92): "Libelant suffered no injury or injuries in the service of the ship prior to, at the time of, following, or as a direct or proximate result of the bombing of the vessel." The District Court further found (Finding of Fact No. 7, A. 92):

“Libelant was not repatriated to the United States with the balance of the crew because of incurring a disability approximately three weeks after the destruction of the vessel, the disability being brought on in part, by libelant’s own misconduct while at Soerabaya * * *. The disability preventing libelant’s repatriation was neither caused by nor in any way connected with libelant’s service aboard said vessel, nor did the bombing of the vessel bear any proximate relationship to the onset of said disability.”

These findings were based upon consideration of all the evidence presented to the District Court by the witnesses called by both parties. The findings reflect the District Court’s opinion and estimate of the integrity and reliability of those witnesses as each man appeared on the witness stand to give his testimony, and clearly indicates the District Court believed that Nelson did not sustain a fracture of his right foot or his right wrist, nor any other of his alleged injuries at the time of the bombing of the vessel. Otherwise how explain the uncontradicted testimony that Nelson took an oar in the lifeboat, that he requested no aid at Tarakan, Balikpapan, or Soerabaya, and that he was observed walking about Soerabaya for two weeks or more after arrival at that port, all without any apparent difficulty? We believe that Nelson’s apparent fortitude in the face of his alleged adversity was discounted by the District Court upon the basis of the oral testimony and documentary evidence respecting the onset of a paralytic stroke (hemiplegia) of the right side, probably re-

sulting from a brain hemorrhage, suffered fully three weeks after the bombing, and bearing no causal connection thereto, together with such other misfortunes to his wrist and foot as may thereafter have befallen him during his internment. There were certainly no signs of any injury of the Appellant's head to account for the hemorrhage suffered. The testimony of the Master, Chief Mate and Purser shows that the disabilities of wrist and ankle must have occurred some time during Appellant's internment since the disabilities were not known to have been incurred at the time of the bombing of the vessel, nor at any time thereafter and prior to their departure from Soerabaya. It should be remembered in this regard that Nelson did not tell Dr. Guterman, his own doctor, of the paralytic stroke, and that Dr. Guterman confessed his inability to ascribe a cause to the condition of the right leg until furnished with copies of prior clinical records which included Nelson's own case history respecting the brain hemorrhage and paralysis. The existence of venereal disease, coupled with alcoholic indulgence, renders one very prone to this type of vascular (hemorrhagic) action, as testified to by Dr. Yoell (A. 195). Nelson's indulgence in alcohol while at Soerabaya is neither contradicted nor diminished by any showing that others of the crew similarly indulged.

So far as libelant's low back pains are concerned, no allegations in this regard were made by libelant in either his original or in the amended libel. Nor did he assert any complaint in this regard to Dr.

Yoell at the time of his examination of libelant, and Dr. Yoell found no such muscle spasms, restrictions of movement, or other mild disorders such as were set forth by Dr. Guterman. Under the circumstances we believe that libelant's low back pains, if he has any, are attributable to his stroke, to the psycho-neurosis noted by the United States Marine Hospital at San Francisco, and to libelant's history of syphilis and alcoholism.

The District Court very properly concluded that Nelson suffered no injuries in the service of the vessel as a direct or proximate result of the bombing. Appellant urges that all the testimony contrary to his own must be disregarded, and the stamp of veracity and probability placed upon his improbable testimony. This the District Court refused to do. We do not think this Court may properly rule under the circumstances that the District Court's findings are clearly erroneous and not supported by substantial evidence.

2. The District Court further ruled that the applicable union agreement calls for subsistence only, not maintenance as that word is understood when we speak of the maritime right of seamen to maintenance and cure, during the course of a continuing voyage. [Finding of Fact No. 17 (A. 96); Conclusion of Law No. 2 (A. 99).]

Appellant does not discuss the matter except to cite the union agreement (App. brief. p. 50). The short answer to his contention in this regard may be

found in the District Court's opinion on the identical point raised in the case involving the seamen ex the SS. PRESIDENT HARRISON, *Agnew v. American President Lines, Ltd. et al.*, 73 F. Supp. 944 at 951. The decision respecting maintenance was affirmed by this Court in its amended opinion filed May 18, 1949 (Case No. 11,943).

3. Assuming that Appellant was not injured in the service of the vessel, there exists no implied contract under the general maritime law to pay him maintenance while ashore merely because the vessel was lost. The point was established by this Court in its decision in the case of *Agnew v. American President Lines, Ltd. et al.*, case No. 11943, per amended decision dated May 18, 1949. We do not intend to further labor the question respecting the fact that Appellant was not injured in the service of the vessel. The legal point follows as a matter of course.

4. In like manner it follows, from this Court's decision in the *Agnew* case, that payment of maintenance during internment, again assuming non-injury, is not concurrent with payment of wages which were agreed to be and were paid under the shipping articles. In the words of this Court in the *Agnew* case, involving the same question:

“Wages constituted one kind of ship's obligation to the sailors. Maintenance is another kind.”

C.

APPELLANT IS NOT ENTITLED TO MAINTENANCE FOLLOWING REPATRIATION FOR THE REASON THAT THE DISTRICT COURT FOUND APPELLANT WAS NOT INJURED DURING THE COURSE, NOR AS A PROXIMATE RESULT, OF HIS EMPLOYMENT ABOARD THE VESSEL.

The facts respecting whether or not Appellant was injured during the course, or as a proximate result, of his service aboard the vessel have been heretofore discussed in connection with the question of maintenance during internment, and need not be further reviewed. If Appellant is not entitled to maintenance during internment he is not entitled to maintenance thereafter. Moreover, reference to the clinical abstract from the San Francisco Marine Hospital (Respondents' Exhibit "A"), discloses that Appellant was an in-patient for the period November 10—November 24, 1945, at which latter date he was discharged, except that out-patient treatment for venereal disease was recommended. Appellant explains his failure to secure employment until April 30, 1946, on the ground that he was "weak." (A. 152.) We submit that if Appellant was discharged from the Marine Hospital as fit for duty except for the necessity of treatment for venereal disease, he is not entitled to anything by way of maintenance following such discharge, nor, of course, during the time he was an in-patient.

Calmar Steamship Corp. v. Taylor, 303 U.S. 525, 531, 82 L. Ed. 993, 998, 58 S. Ct. 651.

We note Appellant has a further argument (App. Brief, p. 58) to the effect that "The imprisonment necessarily flowed from his service to the vessel, and

the hospitalization and subsequent convalescing period were directly related to that service." Appellant, in so arguing, disregards all the evidence and the finding of the District Court (Finding of Fact No. 7, A. 92) to the effect that Appellant's internment directly resulted from the fact that he alone, of the forty-eight seamen, was not repatriated during January, 1942, because of being hospitalized due to the occurrence of a brain hemorrhage and resulting hemiplegia (paralysis of the right side), fully three weeks after the loss of the vessel. Medical testimony respecting the concurrence of venereal disease and alcoholic indulgence as a cause of the hemorrhage should not be so lightly discounted. Appellant would have American President Lines held liable for payment of maintenance following loss of the vessel solely because of the onset of some disability while the seaman was awaiting repatriation, which disability bears no proximate causal relationship to any employment in the service of the vessel. As pointed out by this Court in its decision in the *Agnew* case:

"No authority is cited for such a proposition and the contrary inference is to be drawn from *Alaska S. C. Co. v. United States*, 290 U.S. 256, 262."

D.

APPELLANT IS NOT ENTITLED TO ANY SUM BY WAY OF RECOVERY UNDER THE COMMERCIAL WAR RISK INSURANCE POLICY FOR THE FOLLOWING REASONS.

1. The rider to the shipping articles and the applicable union agreement required American

President Lines to provide war risk insurance covering death only, and such insurance was actually procured;

2. Even assuming that the rider to the shipping articles and the applicable union agreement required American President Lines to provide war risk insurance covering disability as well as death, Appellant did not incur any disability as a result of war risks at the time of the loss of the vessel.

1. Respecting the obligation on the part of Appellee American President Lines to provide war risk insurance to Appellant we wish to first dispose of the matter of Appellant's argument respecting the Findings of Fact and Conclusions of Law, as urged in his brief at pages 64a, 65 and 66. The position of American President Lines at the trial was that originally set forth in its Answer to the second cause of action in the First Amended Libel (A. 50), namely, that the rider to the shipping articles required the American President Lines to furnish war risk insurance to members of the crew in accordance with the agreements with the various maritime unions, and that war risk insurance was accordingly provided, covering death only, such coverage being all that was required. The testimony of Mr. Kester, Manager of American President Lines Insurance Department, and the colloquy between the District Court and counsel for the respective parties (A. 261-274) clearly establishes that at no time did American President Lines concede any obligation to provide war risk insurance respecting anything but death. The Order

for Decree by the District Court upheld American President Lines' position (A. 85, 86), and directed appropriate Findings of Fact and Conclusions of Law to be prepared. Counsel for American President Lines complied with the Order, but admits that it erred in preparation of Findings of Fact No. 19 (A. 96), in that said Finding used the word "injuries" instead of the word "death". That such was an unintentional error we believe is shown by the fact that Conclusion of Law No. 5 (A. 99), also prepared by counsel for American President Lines, states:

"5. Respondent American President Lines, Ltd. fully complied with its obligations respecting the procurement of war risk insurance."

There was an error made, but, we submit, there was no intentional abandonment of its position by the American President Lines respecting the type of war risk insurance that was to be provided the crew, nor, we assure this Court and counsel for Appellant, any uncertainty of position. We do not understand that Appellant has been prejudiced in any respect in this regard.

It may be further pointed out that Finding of Fact No. 19 (A. 96) actually supports the second ground set forth by the District Court in its Order for Decree (A. 85, 86):

"As to the cause of action against American President Lines, Ltd. alleged to arise out of the agreement to furnish war risk insurance, I am of the opinion, first—that the type of war risk insurance, which the documentary evidence demonstrates respondent was obligated to furnish,

does not afford libelant a claim for insurance; secondly—that even if such obligation existed, libelant did not suffer any injuries thereunder compensable”.

The “obligation” referred to by the Court in the second ground means the obligation alleged by Appellant, namely, to furnish war risk insurance covering the crew for both injuries and death on this voyage. But the obligation was not to cover the crew after the termination of the voyage, which occurred when the vessel was lost, and since the District Court found Nelson had not been injured as the result of a war risk, he was not entitled to recover in any event.

Assuming, as Appellant claims, that he was injured during the bombing, the question is presented as to whether he has any claim against American President Lines based on the obligation of American President Lines to provide the crew with “war risk insurance in accordance with Agreements with Unions shown above.”

It is noted that Appellant still objects (App. Brief pages 60, 64) to the fact that the District Court admitted in evidence the Marine Cooks and Stewards Supplementary Agreement of October 10, 1941. Frankly, we cannot understand the reason for the objection, because if Appellant wants to limit the finding of an obligation on the part of American President Lines to furnish war risk insurance to the crew to such obligation as may be imposed by Paragraph 8 of the rider, he is cutting the ground from beneath his feet. The language of the

rider says that war risk insurance is to be furnished "in accordance with Agreements with Unions shown above." The agreement with the Marine Cooks and Stewards union referred to is that of July 5, 1940, and it contains nothing respecting war risk insurance. If there was no agreement with the union, there was no obligation under the rider, for the existence of the obligation depended upon the existence of an agreement with the union. There is no other way to explain and give effect to the words in the rider "in accordance with * * *". If it be contended that the rider alone contains all of the terms of the contract between the crew and shipowner, then the words "in accordance with Agreements with Unions shown above" must be given no meaning at all.

It should be pointed out, in this regard, that the obligation to furnish war risk insurance to the crew was not inserted in the rider purely as a gratuity on the part of shipowners, but came as the result of insistent union demands therefor, which demand by the Marine Cooks and Stewards and agreement by shipowners is set forth in the Supplementary Agreement of October 10, 1941. There seems nothing incongruous or illegal (46 U.S.C., Sec. 564, subsection 8) about making reference in the rider to the various Agreements in order to measure the extent of the obligation. It is common in contracts to thus make reference to other existing written obligations or agreements between parties, nor does this appear to be in conflict with the provisions of 46 U.S.C., Sec. 676, to the effect that the shipping articles "shall be deemed to contain all the conditions of contract with the crew

as to their services, pay, voyage, and all other things.” To require insertion in the shipping articles of the multitude of conditions whereby the seamen from six separate unions consent to be employed would be an absurdity, so reference to the conditions, such as war risk insurance, is made in the rider. In other words, the shipowner agrees with the various unions to provide war risk insurance under certain conditions, and the agreement is reduced to writing. The rider to the shipping articles confirms the existence of the agreement without spelling out in each of six instances the conditions of the obligation, handling the matter by the simple proviso that the existence and conditions of the obligation shall be “in accordance with Agreements with Unions shown above.”

Paragraph 4 of the Marine Cooks and Stewards Supplement dated October 10, 1941, effective August 16, 1941, provides:

“War risk insurance in the sum of \$5,000. shall be furnished to members of the crews of vessels on voyages provided for in this Agreement.”

The voyages provided for were those commencing on or after August 16, 1941, which would include that voyage of the SS. RUTH ALEXANDER, which departed from San Francisco on October 23, 1941, for a trans-Pacific trip and return, during the course of which voyage the vessel was destroyed on December 31, 1941.

Appellant contends that there is nothing in the rider, and, we infer, in the union agreement, limiting the type of “war risk” insurance to be procured by American President Lines, and asserts that insurance

covering any and all war risks should have been procured. Appellant objected at the trial to American President Lines introducing any evidence respecting the mutual intention of the contracting parties with regard to the type and extent of insurance agreed upon, Appellant urging that the wording of the rider and union agreement was clear and broad, and no evidence was needed or called for in explanation thereof. We disagreed both then and now.

The rights of the parties rest upon contract. Each party finds in the rider and the union agreement something different. Appellant states that American President Lines cannot show what meaning was ascribed to the words "war risk insurance" by the contracting parties because there exists neither uncertainty nor ambiguity in scope or definition thereof, nor are there any limitations thereon. It should be noted that the wording of the rider, which Appellant desires to have construed against American President Lines, is identical with the wording of the union agreement, which was written by representatives of both union and shipowner.

We look, as we have every right to do, to the meaning given the words "war risk insurance", as indicated by the usage and action of the contracting parties. It has always been our thought that contracts are to be interpreted so as to give effect to the mutual intention of the parties (Cal. Civil Code Sec. 1636), and with this we hope Appellant agrees. If the contract is written, as in our case, the intention will be ascertained from the writing, if possible (Cal. Civil Code, Sec.

1639). We challenge the ability of Appellant to render certain, and to define the meaning of the words "war risk insurance" without reference to the circumstances under which the contract was made.

We call the Court's attention to the fact that according to Appellant's contention the term would include insurance against loss of personal property due to a "war risk". Yet the contracting parties did not think so, for they made special provision in the same section of the agreement dealing with war risk insurance, and in Paragraph 7 of the rider (A. 35, 36), for direct reimbursement for loss of personal effects. We think it quite obvious that the parties thereby clearly indicated that the words "war risk insurance" did not have the wide scope now urged by Appellant.

In like manner the contracting parties were aware of the state of the maritime law respecting a vessel's obligations for maintenance and cure for seamen falling sick or being injured while in the service of the ship. Appellant would have us now believe that the parties contracted for a double recovery by the seamen from the vessel owners.

The fact that Appellant seeks recovery in the alternative against either the United States or American President Lines would appear to us to be the best evidence of the uncertainty which exists in the mind of Appellant's counsel in connection with whether the words "war risk insurance" (once known to encompass only the type of insurance procured) can be rendered, through lapse of time and present representa-

tions, more encompassing than was ever contemplated by either of the parties at the time of contracting.

The questioned words are not of themselves absolute, unambiguous, and certain, being words which may be used by different parties with different connotations and to express different ideas. As such we can and should refer to the circumstances (Cal. Civil Code Sec. 1647) under which the present parties contracted; the whole of the contract (Cal. Civil Code Sec. 1641) entered into, including the special provision for loss of personal effects; and to the special meaning given the words (Cal. Civil Code Sec. 1644) by the parties themselves, as evidenced by usage and the entirely separate (but entirely consistent) acts of the parties themselves thereunder, American President Lines in procuring insurance against loss of life, and counsel for Appellant in seeking to have Appellant given war risk insurance by the United States against personal injuries, retroactive to October 1, 1941, prior to the effective date of the rider to the articles, which rider is now asserted to so clearly provide for insurance against personal injuries due to war risks.

In order to ascertain the true meaning of the words "war risk insurance" the District Court made reference not only to the rider and the Marine Cooks and Stewards Supplementary Agreement, but also to the Supplementary Agreement, dated October 10, 1941, entered into between the Masters, Mates, and Pilots and the shipowners (A. 270), the provision therein respecting the type of war risk insurance to be provided having been set forth above. We believe this was

properly done by the District Court as a guide to an interpretation of the meaning of the words "war risk insurance * * * in accordance with Agreements with Unions * * *", and the latter Agreement clearly indicated the meaning of the words "war risk insurance" were not meant to have the universal and all inclusive significance ascribed to them by Appellant.

2. Even assuming that the rider to the articles and the applicable union agreement required American President Lines to provide war risk insurance covering disability (as well as death) from war risks, Appellant did not sustain any disability as a result of war risks at the time of the loss of the vessel, or as a direct or proximate result thereof.

Appellant contends (App. Brief, pages 63, 64c, 66) that the policy of war risk insurance should have covered any kind of injury, disability, or loss suffered as a result of war risks, such injury, disability or loss to include internment.

First of all, any insurance procured was to be applicable "on this voyage" (according to the rider to the articles) and "on voyages" (according to the union agreement). And we do not understand Appellant contends that the voyage did not conclude upon the sinking of the vessel.

Agnew v. American President Lines, Ltd. et al.,
73 F. Supp. 944, 951.

Appellant suffered no injuries from war risks during the course of the voyage, and we do not propose to further elaborate on the matter. Appellant's con-

tention that events occurring after the termination of the voyage were also covered is not sustained by any provision of the rider nor by the applicable union agreement.

The matter of the extent of the shipowner's liability to the Appellant in the event of internment was covered by other provisions of the rider to the articles respecting wages, which were paid, and war bonus, the ultimate payment or non-payment of which is subject to prior stipulation between the parties.

If American President Lines had procured no insurance whatsoever for the crew of the vessel, and the seamen sought to have the provisions of the shipping articles and of the union agreement specifically enforced in connection with procurement of "war risk insurance", a Court would be hard pressed to determine from those words alone the type and scope of insurance that should be procured.

Rest. of Contracts, Sec. 32, 370;

Cal. Civil Code, Sec. 3390, subdiv. 6.

Although the wording of the rider to the shipping articles and of the union agreement is not certain with regard to the scope of the insurance to be procured, and the contract in this respect could be viewed as too uncertain for enforceability, still where the parties' actions thereunder indicate that certainty existed as to their obligations despite the wording of the contract, then the Court should not be called upon to impose greater obligations upon one of the parties than were

originally contemplated by the parties themselves, the wording of the contract having been rendered certain by the actions of the parties thereunder.

Even if American President Lines had contracted to provide a policy of war risk insurance which covered, in addition to loss of life, injuries as well, still the coverage was to exist only on the "voyage", and libelant's injuries occurred three weeks after the end of the voyage, and were not within the period of coverage.

Libelant's injuries, paralysis, hemorrhage, and the like, not only occurred after the voyage was over, but were not occasioned by "war risks", occurring rather by reason of causes entirely distinct therefrom. His internment resulted from his inability to travel after a paralytic stroke, not because of the bombing of the vessel, nor as a result of any service for the vessel.

V.

CONCLUSION.

Appellee American President Lines believes that the only real issue in this case is one of fact, namely, whether or not Appellant was injured during the course of the bombing of the vessel, or as a direct or proximate result thereof. Appellant had his day in the District Court, and failed to convince that Court of the truth of his allegations. Upon that ground Appellee American President Lines submits that there exists

no basis in the facts or in law for a different ruling herein from that of the District Court.

Dated, San Francisco, California,
June 27, 1949.

Respectfully submitted,

TREADWELL & LAUGHLIN,
EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Proctors for Appellee,
American President Lines, Ltd.

CHARLES M. HAID, JR.
Of Counsel

(Appendix A Follows.)

Appendix A

Rules of Construction

California Civil Code, Section 3390, subdivision 6:

“3390. *What cannot be specifically enforced.* The following obligations cannot be specifically enforced:

* * * * * *

“6. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.”

California Civil Code, Section 1636:

“1636. *Contracts, how to be interpreted.* A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”

California Civil Code, Section 1639.

“1639. *Interpretation of written contracts.* When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however to the other provisions of this title.”

California Civil Code, Section 1641:

“1641. *Effect to be given to every part of contract.* The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

California Civil Code, Section 1644:

“1644. *Words to be understood in usual sense.* The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”

California Civil Code, Section 1647:

“1647. *Contracts explained by circumstances.* A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.”

~~ORIGINAL~~

No. 12193

United States
Court of Appeals

for the Ninth Circuit

MARICOPA PACKING COMPANY,
Appellant,

vs.

DONALD B. SHORTRIDGE, Trustee in Bank-
ruptcy of the Estate of Northern Meat Com-
pany, Inc., Bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Arizona

FILED
APR 4 - 1949

PAUL P. O'BRIEN, JR.

CLERK

No. 12193

United States
Court of Appeals

for the Ninth Circuit

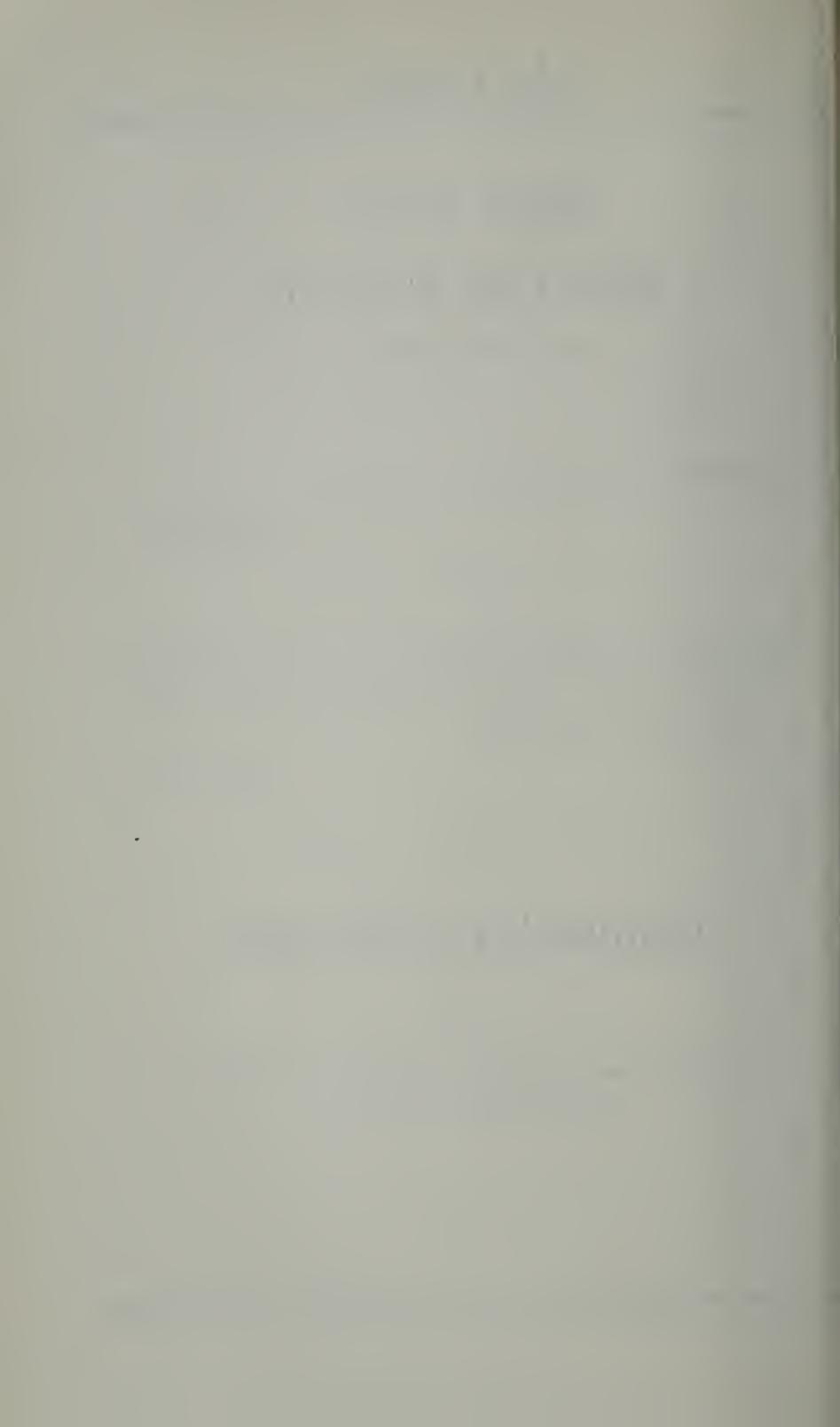
MARICOPA PACKING COMPANY,
Appellant,

VS.

DONALD B. SHORTRIDGE, Trustee in Bankruptcy of the Estate of Northern Meat Company, Inc., Bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Arizona



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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11 West Adams Street,
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Appellee, in propria persona.

In the United States District Court for the
District of Arizona

In Bankruptcy—No. B-1215 Phx.

In the Matter of NORTHERN MEAT COMPANY,
INC., Bankrupt.

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW, AND RECORD ON
REVIEW

To the Honorable Judge of the District Court of
the United States, for the District of Arizona:

I, Stanley A. Jerman, Referee in Bankruptcy
herein, on the petition to review an order dated
September 15, 1948, made by me, hereby certify
as follows:

1. Petition for Review of Maricopa Packing
Company, an Arizona Corporation, dated October
15, 1948.

2. Order and finding of fact, dated September
25, 1948, to be reviewed on said petition.

3. Stipulation and order extending time for
filing petition for review.

4. A transcript of the evidence.

5. Exhibit: Northern Meat Company, Inc., finan-
cial condition as at March 24, 1948, prepared by
Laird A. Racey, CPA.

6. The questions presented are the alleged errors
set forth in the petition to review, dated Septem-
ber 25, 1948.

7. Memorandum Brief of petitioner in support of petition for review.

Dated: October 18th, 1948.

Respectfully submitted,
/s/ STANLEY A. JERMAN,
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 18, 1948.

[Title of District Court and Cause.]

Grand Jury Room, Federal Building,
Phoenix, Arizona.

September 25, 1948.

Before: Stanley A. Jerman, Referee in Bankruptcy. [1*]

Appearances: Donald D. Shortridge, Trustee for the Estate of Northern Meat Company, Inc., Bankrupt; L. V. Rhue, representing Maricopa Packing Company; Mr. Cox, representing Mr. C. B. Winn.

PROCEEDINGS

The Referee: All right, proceed.

Mr. Shortridge: I would like to have Mr. Dooley sworn.

L. K. DOOLEY

was called as a witness and being first duly sworn testified as follows:

Direct Examination

Mr. Shortridge:

Q. State your name, please.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of L. K. Dooley.)

A. L. K. Dooley.

Q. What is your profession?

A. Certified Public Accountant.

Q. Were you an officer in the Northern Meat Company? A. Yes, secretary and treasurer.

Q. Did you keep the books of the Northern Meat Company? A. Yes.

Q. This Trustee's Exhibit A for identification, the books of the company, will you please identify these? I merely want to identify these books so subsequent books are based on them.

A. This is a ledger.

Q. This is the ledger of the Northern Meat [2] Company?

A. That is right, this is the cash receipts, checks, disbursements, cash paid out.

Q. These two represent the permanent records, accounting records?

A. Yes, plus the vouchers.

Q. Have they been prepared by you personally?

A. That is right.

Q. They are in your handwriting?

A. That is right.

Q. These books, to the best of your knowledge and belief, contain all the accounting of the company up to bankruptcy? A. They do.

Mr. Shortridge: That is all.

(Witness excused.)

LAIRD A. RACEY

was called as a witness and being first duly sworn testified as follows:

Direct Examination

Mr. Shortridge:

Q. State your name. A. Laird A. Racey.

Q. What is your profession?

A. Certified Public Accountant. [3]

Q. Mr. Rhue, will you stipulate to his qualifications?

Mr. Rhue: Yes.

Mr. Shortridge: Q. I hand you here a paper which I ask to be marked Trustee's Exhibit B for identification.

The Referee: These books I am not going to mark for identification. This will be Trustee's Exhibit A.

Mr. Shortridge: Q. Will you please tell me what this paper is?

A. This is the report prepared by me of the audit of the books of the Northern Meat Company, a corporation.

Q. In your investigation would you say there were any assets listed on the books of the Northern Meat Company that are not contained in this report?

A. Not to my knowledge.

Q. From your examination of the books and other records did you discover anything that led you to believe other assets and liabilities existed than those appearing on the records?

A. Not that other assets and liabilities existed. I do have one addition to this report which I would like to bring out. The report was [4] completed for

(Testimony of Laird A. Racey.)

the purpose of bringing up here some days prior to this and at that time, as I stipulated in the report, there were two of the accounts payable that I had been unable to confirm by direct confirmation. Subsequent to the completion and typing of the report, one of those accounts payable, those creditors replied to my request for a confirmation of the account owed to him, that did change the net result of the report to a certain extent.

The report shows the amount owing, that is as included in one item here on the liability side, accounts payable adjusted to March 24th, 1948, is shown as \$2,968.15. One of the items going to make up that total was an amount owed to the I. V. Packing Company which, as best I could determine, amounted to \$645.10 as of March 24th, 1948. The confirmation letter which was received on the 22nd of September, they stated that the Northern Meat Company owed them \$936.76 at that date. A second confirmation letter was received subsequent to the completion of the report resulted in a slight reduction in the amount owed to Golden Meat Company. The net result of the two confirmation letters received is an addition to the liabilities shown as [5] accounts payable of \$263.79.

Mr. Rhue: Q. Was that increase shown due as of March 25th or subsequent thereto?

A. I used the close of business as of March 24th and that original letter requested the amount owed as of that date, and it is in the file.

Mr. Rhue: Q. Does their reply show whether or not it was March 24th or the date on which they submitted their account?

(Testimony of Laird A. Racey.)

A. I have here the letter. Their reply written in pen and ink on the bottom of my letter, "In reply to the above, said account is \$936.76 as of March 24th, 1948." That was signed by Lillian Don of the Paramount Company with the notation "We are successors of the I. V. Packing Company and have bought the above account."

Mr. Shortridge: Q. I take it all the liabilities letters were sent out on a standard accountant's request form and you have received answers to each of them?

A. I have received answers to the major portion of them. I wrote letters rather than using the printed form. I have one of them in front of me.

Q. This is standard accounting procedure in [6] sending out this type of letter?

A. Yes, the standard audit procedure in performing any audit is to ascertain, so far as possible by outside methods, and verify through that procedure the sums and amounts owing on the books.

Q. Now going over here to the assets side, I notice you have cash on deposit, head office, First National Bank, \$805.87 and now I am going down to the amount, accounts receivable, \$8.10 that you estimate to be worthless, is that correct?

A. I was basing the estimate on the fact that apparently it has been impossible to collect that \$8.10 from them up to date.

Q. Now there were checks unpaid, you have also marked that as uncollected?

A. In conjunction with the returned checks, unpaid, I examined in the trustee's files a letter from

(Testimony of Laird A. Racey.)

a gentleman connected with the forgery department of the Police Department—

Q. Mr. Arnold, was it not?

A. It was someone else there. He stated that the makers of the checks could not be located. That was the substance of the letter.

Q. Here you have an item, prepaid insurance, [7] \$273.23, estimated to realize \$191.68. Where did you get that information?

A. I telephoned the insurance agency, Kleinman's Insurance Agency and spoke with Frank Kleinman and requested that he determine the amount of cash refund that would be available at that date, had these policies been cancelled. He stated he would write me. In lieu of a letter he telephoned me.

Q. You list the amount of prepaid interest as having no cash value.

A. The prepaid interest item, in my opinion, and from my examination, is merely an accounting method to set up the amount of interest which is included in the installment loans, and prorate them equitably over the life of the loan. As it is terminated it is not possible to get a refund of that interest so there is no cash realized.

Mr. Rhue: Q. Just what items does that cover, do you know?

A. I don't know if I understand you.

Mr. Rhue: There were several contracts there for equipment and machinery and so forth, was that interest covering those items?

A. That is my understanding from my examina-

(Testimony of Laird A. Racey.)

tion, the prepaid interest was on the [8] three contracts.

Mr. Rhue: If those contracts were to run for several months or a year, but were terminated or cancelled out, that interest would be an asset?

A. It is my understanding there is no manner in which any of that interest would be refunded to the borrower of the money. It is a part of the contract which must be paid over the length of the life of those installment loans, as the contract is paid. If the contract is paid prior to the regular date, the interest still is not refunded.

Mr. Rhue: Did you check those contracts to determine that fact?

A. I did not, that is customary procedure.

The Referee: I understand that. You pay your interest ahead of time when they make up your contract.

Mr. Rhue: That is true, but if it is paid off or refinanced, they don't pay that.

The Referee: You just try and get it back, you can't get a refund.

Mr. Shortridge: We submit here the only test to realize the value of the assets is of this date. \$50.82 listed as the cash realizing [9] the value of Industrial Commission insurance, how did you arrive at that?

Mr. Rhue: What is that, Mr. Shortridge?

Mr. Shortridge: \$50.82 Industrial Commission.

The Referee: That is your unused deposit with the Industrial Commission?

The Witness: Yes.

(Testimony of Laird A. Racey.)

The Referee: Did you ask the Industrial Commission about that?

A. There was in the file a statement of premiums due to the Industrial Commission and it showed a deposit of \$107 and an amount due which was slightly in excess of the \$56.18, but, of course, working that back to March 4th resulted in \$56.18 which would have been due at that date.

Mr. Rhue: The Industrial Commission shows here \$107.

The Referee: The book shows \$107.

Mr. Shortridge: \$107 less than accrued figures. Now the next item, a Chevrolet panel truck, \$1,021, subject to lien of \$615.96, estimated to realize unsecured creditors nothing. Please explain that.

A. In explaining that I would like to refer back to the report, the last sentence on Page 1 of the report. I stated I have made no attempt [10] to appraise the assets but have adopted those values which, in my opinion, most clearly reflect their true realizable value. Upon final disposition the Chevrolet truck and large items of equipment did not realize anything over and above the loans against them. It is my belief that the best measure of realizable value of any item is the amount realized at a sale. I have therefore used these figures in determining the realizable value of the truck and large items of equipment.

Mr. Rhue: You know when that truck was disposed of?

The Witness: I do not have the exact date, it was sold at an auction subsequent to March 24th.

(Testimony of Laird A. Racey.)

Mr. Rhue: This Northern Meat Company was a going concern on the 24th of March?

A. That is right.

Mr. Rhue: And that was an asset in use with the company at that time?

A. Yes, sir.

Mr. Rhue: We object to this evidence, your Honor, as being immaterial here. It was a going concern, it had the assets and if it had been sold subsequent thereto that can be no evidence [11] of value on the 24th of March.

Mr. Shortridge: We submit the amount on the books is not what we are getting. The question is what that truck would have realized had it been sold on March 25th.

The Referee: The market value.

Mr. Shortridge: Yes.

The Referee: The objection is overruled.

Mr. Rhue: If your Honor please, that truck at that time when it was in use by the company and a going concern was certainly more valuable than subsequently when it went out of business.

The Referee: I don't think so, the market value would be exactly the same.

Mr. Rhue: Furthermore, the estimate is made here by the auditor, he isn't qualified to make such an appraisal. I object to any testimony he puts on as an appraiser, he is not qualified to appraise these properties at that time.

The Referee: He is giving testimony upon which he based his conclusion and it is up to me to pass on the weight or whether it is right or not.

Mr. Shortridge: I submit this is quite commonly submitted by certified public accountants. He is only

(Testimony of Laird A. Racey.)

presenting these figures for what they [12] are worth.

The Referee: Go ahead.

Mr. Shortridge: I am further prepared to show, your Honor, if necessary in this thing the truck was later sold at a loss.

The Referee: You are the trustee?

Mr. Shortridge: Yes.

The Referee: You make that statement as a trustee, as an officer of this court?

Mr. Shortridge: I will make the statement, a letter was received by me from the Assistant Manager of the First National Bank, August 25th, 1948, in which it was stated that the bank received the truck on May 26th, 1948, the amount of lien at that time—

Mr. Rhue: Just a minute, that is subsequent to March 24th.

The Referee: I will consider that.

Mr. Rhue: It would be a new asset after that.

Mr. Shortridge: That goes to the weight, not the admissibility. If this truck were bought on March 27th it would have stronger weight than if sold in May.

The Referee: Go ahead. In other words, the truck was sold in May at a loss. [13]

Mr. Shortridge: That is correct.

The Referee: All right, as an officer of the Court here you make that statement. I will take it for what it is worth. Anything else?

Mr. Rhue: I will object to this evidence because

(Testimony of Laird A. Racey.)

it is just the opinion of the bank, it is not worth anything, it is not evidence.

Mr. Shortridge: I don't know, they state in this letter they sold it at a loss. It says, "The public auction was held on June 26th, 1948 at the Arcade Garage and was purchased by the First National Bank for \$615.96."

The Referee: Did you discuss this with the bank?

Mr. Shortridge: No, I requested a letter.

The Referee: Go ahead.

Mr. Shortridge: "The truck was sold July 27th, 1948 to the Arizona Truck Sales and Service for \$575.52, from which was deducted the storage of \$24.48, leaving a net of \$551.04. The bank made no profit on this sale, in fact, we lost money. Trusting this information is sufficient, Very truly yours." Signed by C. W. Morris, Assistant Manager.

The Referee: Do you want to raise the—

Mr. Rhue: It is not admissible as to value. [14]

Mr. Shortridge: If this is not admissible as to the value of the car, then what evidence is admissible?

The Referee: I will consider it. Proceed.

Mr. Shortridge: You have here listed a number of assets, a Sanitary Scale, a Vaughn meat saw, a Chotillon beam scale and so on with an offset to the conditional sales contract leaving a balance of nothing for unsecured creditors. How did you arrive at that figure?

A. That item and also the walk-in freezing box above here were subject to conditional sales contracts held by the First National Bank. Upon final

(Testimony of Laird A. Racey.)

disposition they did not realize anything over and above the amount owed by them.

Mr. Rhue: When was that final disposition?

A. It was by court order.

Mr. Rhue: Do you recall the approximate date?

A. Around September 1st, I believe.

Mr. Rhue: Of this year? A. That is right.

Mr. Rhue: I object there as to this evidence not being permissible as of value of the 24th of March.

The Referee: That was August 14, 1948. [15]

Mr. Shortridge: Again we say this evidence should be considered and the question here is one of weight and not admissibility.

The Referee: All right, proceed.

Q. (By Mr. Shortridge): You have addition of small tools and equipment, no estimate available, in other words, you estimate——

A. In preparation of the statement I have tried to be as conservative as possible and in this particular item I could not ascertain that it was included on the appraisal sheet, nor could I find any means whatsoever of determining what the value might be, therefore, I have used the full book value, although it is my opinion they probably would not have produced that much.

Q. The various small item of office equipment, \$20, where did you get that?

A. For lack of any other figure that is the figure that was used on the appraisal for the purpose of the trustees.

Q. (By Mr. Rhue): What appraisal are you referring to? A. I believe Mr. Green's.

(Testimony of Laird A. Racey.)

Mr. Rhue: When?

A. On August 23rd, 1948.

Mr. Rhue: Not as of March 24th, 1948? [16]

A. As far as I know there was none available as of March 24th, 1948, had there been I would have used it.

Q. (By Mr. Shortridge): You have organization expense \$72.69, why haven't you listed that?

A. In my opinion it is not possible to realize anything out of organization expense.

Mr. Rhue: Was that a preferred charge or credited on the books for organization expense? It was all charged off except that amount?

A. That is my understanding, yes.

Mr. Rhue: You know the original amount charged off for organization expense?

A. I do not know if I understand you.

Mr. Rhue: In setting up the books they usually allow a certain amount charged off for organization expense, is that not a fact, and they charge that over a period of time, a year or eighteen months and charge off each month so much as an expense item.

A. That is one way of handling it.

Mr. Rhue: And this \$72 showed that all had been charged off except that amount, is that right?

Q. (By Mr. Shortridge): Has any amount of the organization expense been charged off? [17]

A. I can't answer that definitely, I would have to refer to the books. My thought is that there has been nothing charged off. (Consults book.) Accord-

(Testimony of Laird A. Racey.)

ing to the book that is the total amount set up originally for organization expense, nothing has been charged off.

Q. (By Mr. Shortridge): I believe you stated, Mr. Racey, that the accounts payable for the most part was verified and pointed out the differences of the amount of \$2968 shown and corrections for the I. V. Packing Company. Now starting up here, secured creditors, \$615.96, where did you get that figure?

A. That was shown on the books and confirmed by the bank confirmation mailed to the First National Bank.

Q. Where did you get the figure of \$1287?

A. In the same manner.

Q. And \$912.75? A. Same manner.

Q. Where did you get the figure—

Mr. Rhue: Just a minute, is that the total value of the property at that time or just the unpaid balance due on those conditional sales contracts?

A. Unpaid balance due on the conditional [18] sales contracts.

Q. And that does not reflect the value of the property? A. That is the liability.

Q. That is still due on those contracts?

A. That is correct.

Q. (By Mr. Shortridge): Where did you get the item of \$56.18?

A. That was taken from the statement of premiums due in the files from the Industrial Commission.

(Testimony of Laird A. Racey.)

Q. The \$167 due on—due the Collector of Internal Revenue?

A. That item was taken from the books.

Q. The item of \$15.65, Arizona Tax Commission, sales tax.

A. Also taken from the books.

Q. Just what was the constitution of this item of \$80.10, loans from stockholders, do you recall?

A. Various small loans made from time to time by the stockholders.

Q. Were all the stockholders represented, that is, there were three stockholders?

A. That is right.

Q. Mr. Winn, Mr. Richardson and Mr. Dooley. Were all three owed money by the company?

A. I will have to examine the books.

Mr. Rhue: Was there any evidence of that in the form of notes or just an item on the books?

A. In my inspection I do not recall finding any written evidence of those loans other than entries on the books themselves.

Mr. Rhue: For the money advanced by the stockholders? A. Yes, very small amounts.

Mr. Rhue: We wouldn't question that.

Mr. Shortridge: It won't be necessary to search, then. Turning to the asset side close to the bottom, you have a total owed to unsecured creditors, \$3,357.39, this represents what?

A. That is the total amount of the column on the extreme right hand side of the page of the financial statement. That is the total of the items owed

(Testimony of Laird A. Racey.)

to those creditors of the company excluding the creditors who had specific securities, such as First National Bank and the Arizona Industrial Commission.

Q. In other words, by excluding any amounts owed to parties in excess of the realizable value of collateral plus all the unsecured amounts, is that correct? [20] A. Will you repeat that?

Q. In other words, this amount of \$3,357.39 includes unsecured accounts plus any excess of loan liability over the realizable value of collateral?

A. That is correct.

Q. Now the next line over here, total estimated to realize for unsecured creditors, would you explain that figure?

A. That is the total of the second column from the left on this sheet. The amount is, by the methods I have explained here, was estimated would be realized if the assets had been converted to cash on that date, March 24th, 1948.

Q. What does this deficiency of unsecured creditors represent?

A. That is the amount of excess of the total owed to the unsecured creditors over the amount of the total estimated to realize for the unsecured creditors. At this point I want to call your attention again to the information I submitted regarding the accounts that were confirmed subsequent to the completion of the audit, which would make a change in two of these figures we have been talking about.

(Testimony of Laird A. Racey.)

Q. That difference would be to increase the [21] deficiency of the unsecured creditors?

A. To \$1,655.64.

Mr. Shortridge: I believe there is nothing more.

The Referee: You may cross-examine.

Cross-Examination

Mr. Rhue:

Q. According to your statement here, the total assets according to their book value as of March 24th, 1948, is shown to be \$7,858.12, is that right?

A. That is correct.

Q. And the liabilities on the same basis is shown to be \$6,093.79, you don't show that total, but under book value down to capital stock it shows \$6,093.79 according to my figures.

A. Let me check and I will answer that.

Q. Just the book values shown on liabilities.

The Referee: How much does that amount to?

Mr. Rhue: \$6,093.79. Q. Then you would be solvent about \$900, is that it, the difference between \$7,858 and \$6,093.79?

Mr. Shortridge: It would be \$1,774.33.

Q. (By Mr. Rhue): In other words, the book values as carried by the company March 24th, 1948, [22] show a surplus of \$1,774.33 of assets over liabilities?

The Witness: I may change the wording a bit, the word surplus, if it is deleted from there, I would say it showed an excess of assets over liabilities.

(Testimony of Laird A. Racey.)

The Referee: Do the books reflect any depreciation on the property owned by the company?

A. There is no provision on these books for any depreciation whatsoever.

The Referee: When was the property acquired?

A. The latter part of 1947.

The Referee: So it was about six months there?

A. Approximately.

The Referee: And no depreciation?

A. No.

The Referee: Was it new property or used?

A. The Chevrolet truck was used.

The Referee: How about the property used in connection with the business?

A. Again I cannot answer that, I don't know.

Q. (By Mr. Rhue): That Chevrolet you say was new?

A. No, it was a used one, 1940 Chevrolet [23] purchased in 1947.

Q. Now the matter of depreciation is simply an accounting proposition, is it not?

A. Depreciation is an accounting method of prorating the cost of an asset over the estimated life of that asset. It has no particular connection with the amount that might be realized on the sale from that asset.

The Referee: Do you know what would be allowed by the taxing authorities if they were to take the depreciation on this property that is used by the bankrupt?

A. The Chevrolet truck, which at that time was

(Testimony of Laird A. Racey.)

seven years old, I would not give a life of more than two or three years for taxing purposes.

The Referee: How about the other?

A. The other property, the freezing box, possibly eight to ten years life, the smaller items, scales and so forth, my estimate would be an average of five to seven years life.

Q. (By Mr. Rhue): Isn't it a fact that for income tax purposes a truck like the Chevrolet, the life would be five years and you would deduct 20 per cent a year for depreciation?

A. This truck was seven years old when they purchased it. [24]

Q. That is true, but isn't it a fact when making income tax returns that the life of a truck is specified as five years?

The Referee: A seven-year-old truck or a new one? On a new one it might be.

Mr. Rhue: Regardless of depreciation.

The Referee: You might be able to do it on a new truck but not on a used truck.

Mr. Rhue: A used truck right now would cost more than a new truck.

The Referee: Not now, there has been a terrific change in property this year, the bottom has dropped out.

Mr. Rhue: That was not the condition on March 24th.

The Referee: Oh, yes, it was, it has been the condition since early this year. That has been the history of the bankruptcy here. I think the Court

(Testimony of Laird A. Racey.)

can take judicial notice that that condition has changed the last six months. Go ahead, anything further?

Q. (By Mr. Rhue): Isn't it a fact that many mechanical assets, like a truck, even though it may be charged off under depreciation, is still an asset and still has value?

The Referee: I ask this question for [25] purposes of depreciation, for tax purposes, which is based on history. I just asked him what would be—what he as an accountant would be able to take for depreciation. It isn't for this particular property but generally. I wanted to know what he would depreciate this property. Go ahead.

Mr. Rhue: Isn't it a fact that as a going concern the assets of a going concern are all more valuable to it at that time than it is subsequent?

Mr. Shortridge: I object to that question. We are not concerned with going concern values.

Mr. Rhue: Yes, we are.

Mr. Shortridge: We are concerned with liquidating values.

The Referee: You may answer.

The Witness: That is probably true.

Mr. Rhue: So that the values that you have set up here then are estimated values that you have made back to that date?

A. They are not my estimates, they are based on various evidences I have found.

Q. In the files? A. That is correct.

Q. In this bankruptcy proceeding? [26]

(Testimony of Laird A. Racey.)

A. That is correct.

Q. That occurred after July 2nd?

A. That is right.

Mr. Shortridge: And from other sources also?

A. Yes.

Q. (By Mr. Rhue): Did you see this property on the 24th of March? A. I did not.

Q. Did you see it at any time?

A. I did not.

Mr. Rhue: We object to any evidence offered here as to the value of this property.

The Referee: Objection overruled.

Q. (By Mr. Rhue): Now in this procedure the books didn't reflect any depreciation or any other charges other than shown in your report?

A. That is true.

Q. And according to the books the values of the properties as of March 24th is \$7800?

A. That is true.

Q. And that the liabilities were approximately \$1700 less? A. That is correct.

Q. Now while you have set up here and shown that some of these assets were held under [27] conditional sales contracts, isn't it possible that property could have been sold on that date or for a time very near that date for something realized over and above the balance due on the contracts?

A. As a matter of opinion I do not believe I am qualified to answer that.

Q. But the company would have equities in there to the extent of what they had paid on that property? A. That is right.

(Testimony of Laird A. Racey.)

Mr. Rhue: That is all.

The Referee: Mr. Racey, how do you arrive at a going concern value? What do you call that?

A. Going concern value I understand is usually that value which is placed on the books, is used by the concern for statement purposes with the assumption that it will remain solvent and continue in business.

Q. What is it commonly called in language of laymen? You call it good will ordinarily.

A. Well, I could give you a good many definitions of various accounting authorities, but it certainly has the element of good will in it. [28]

Q. When you see good will on a statement, what does that usually mean?

A. The item good will on a statement, if regular accounting methods have been adhered to, reflect the excess of purchase price of the total assets over the actual appraised value at the date of purchase. It is a sum paid because the business is earning better than average profits.

Q. Could you determine from the books here this business was earning better than average profits on the 25th day of March?

A. It appeared to me that this business operated at a loss from the first week it started operations.

Q. So a business operating at a loss for approximately six months, or since its conception, as the case here, there would be no good will at all?

A. I certainly would not consider there would be any. Good will is based on the assumption that

(Testimony of Laird A. Racey.)

a firm is making money, not that it was losing money.

The Referee: That is all.

Q. (By Mr. Rhue): Good will is reputation of the outfit in business, how successful they are, how they pay their bills and all that sort of thing. [29]

A. For accounting purposes I would say no.

Q. There isn't any good will on the books in this case?

A. There is not.

Q. If this company were to go to the bank on the 24th day of March and ask for a loan in that statement they would set up their book values as you have set them up here?

A. That is a matter of opinion.

Q. There assets and liabilities would have been set up as in your accounting here?

A. I am not sure how they would set it up, that is how I would set it up.

The Referee: You always make a statement to the bank and the bank cuts it about half.

Mr. Rhue: Still, Your Honor, it is on the basis of the figures they submit.

The Referee: In this case, are you through?

Mr. Shortridge: I tried to get Mr. Green, the appraiser, he was unable to make it. I can get him on some other day if the Referee desires, he has examined those things.

The Referee: I am ready to rule on it. In this case there is no question in my mind at all that this company has been insolvent from the very beginning, certainly on the 25th of March. [30] I think

you creditors knew it and run an attachment on whatever there was and I would, therefore, find that the company was actually insolvent at the time your garnishment was levied. I will make a finding that it was actually insolvent on that date.

REPORTER'S CERTIFICATE

I Hereby Certify that the proceedings had upon the hearing of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and the foregoing 31 typewritten pages are a full, true and accurate transcript of the same, to the best of my skill and ability.

/s/ SANDRA W. McFATE,
Court Reporter.

[Endorsed]: Filed Oct. 15, 1948. [31]

TRUSTEE'S EXHIBIT "A"

LAIRD A. RACEY

Certified Public Accountant

305 Arizona Title Bldg., Phoenix, Ariz.

September 20, 1948

Mr. Donald B. Shortridge
Trustee for the Estate of
Northern Meat Company, Inc., Bankrupt
Phoenix, Arizona

Dear Mr. Shortridge:

At your request I have audited the books and records of the Northern Meat Company, Inc., of Phoenix, Arizona, for the purpose of determining

the financial condition of that corporation as at the close of business on March 24, 1948 and whether, in my opinion, the assets of the corporation at a fair valuation, exceeded the liabilities.

In the performance of this audit, standard audit procedure has been followed wherever possible. Deposits in banks and amounts owing to banks were confirmed. Replies were received from eight of the thirteen open account creditors confirming amounts owed them. Three of those not replying were confirmed by examination of claims filed in bankruptcy court. No confirmation of amounts shown by the books as owing to the Eye Vee Packing Co., \$645.10, and Simmons Electric Company, \$15.43 on March 24, 1948, was obtained. The realizable amount of the prepaid insurance premiums was confirmed by the Kleinman Insurance Agency of Phoenix, Arizona.

Due to the period of time which had elapsed since March 24, 1948, it was not possible to use regular audit procedure in confirming the petty cash fund shown on the books as \$25.00; the cash on hand shown on the books as \$47.39; nor the merchandise inventory. Mr. L. K. Dooley, accountant for the corporation, informed me that a physical inventory of merchandise was taken weekly and that inventory sheets were included in the records. The inventory was computed from the inventory sheet dated March 27, 1948 by making adjustments for purchases and sales as disclosed by the records back to March 24, 1948. Other items of assets and liabilities were adjusted to properly reflect the book value as of that date.

The attached statement discloses the book value

of assets and liabilities, adjusted to correctly reflect the book value at the close of business on March 24, 1948. The statement also shows the estimated realizable value of the assets at that date.

I have made no attempt to appraise the assets but have adopted those values which, in my opinion, most clearly reflect their true realizable value. Upon final disposition, the Chevrolet truck and large items of equipment did not realize anything over and above the loans against them.

It is my belief that the best measure of realizable value of an item is the amount actually realized at a sale. I have, therefore, used these figures in determining the realizable value of the truck and large items of equipment. Other items are valued as indicated by the statement.

The attached statement discloses an excess of liabilities over the realizable value of the assets, based upon the above mentioned valuations, of \$1,391.85, which would result in a deficiency to unsecured creditors in this amount.

Subject to the limitations mentioned above on determination of inventory value, cash on hand, and petty cash, and the assumption that all assets of the corporation have been disclosed in the petition of bankruptcy, I believe the attached statement fairly presents the financial condition of the Northern Meat Company, Inc. at the close of business on March 24, 1948.

Respectfully submitted,

/s/ LAIRD A. RACEY, C.P.A.

LAR:v

NORTHERN MEAT CO., INC.

Statement Showing Book Value and Estimated Realizable Value of
Assets for Unsecured Creditors, as of Close of Business,
March 24, 1948

ASSETS

	Book Value	Estimated to Realize for Unsecured Creditors
Cash on Deposit, Head Office, 1st Nat'l Bk, Phoenix	805.87	805.87
Cash on Deposit, 1st Phx. Br., 1st Nat'l Bk, Phoenix	211.50	211.50
Cash on Hand	47.39	47.39
Petty Cash	25.00	25.00
Accounts Receivable	8.10	0.00
Returned Checks, Unpaid	164.24	0.00
Merchandise Inventory, computed	422.82	422.82
Prepaid Insurance	273.23	191.68
Prepaid Interest, installment loans.....	298.85	0.00
Utility and other deposits:		
Sales Tax license	1.00	0.00
Industrial Commission	107.00	0.00
Less accrued premiums due to 3/24/48	56.18	50.82
First Nat'l Bank, on night deposit bags.....	3.50	3.50
Light and Water	28.75	0.00
City of Phoenix, license	3.00	0.00
Equipment:		
1940 Chevrolet Panel Truck.....	1,021.00	
Subject to lien, 1st Nat'l Bk, of	615.96	
Walk-in Freezing Box, condenser and motor	2,509.10	
Subject to conditional sales con- tract, 1st Nat'l Bk, of.....	1,278.00	
Sanitary Chopper	485.00	
Federal Steakmaker	237.50	
Sanitary Scale	247.50	
Vaughn Meat Saw.....	595.00	

	Book Value	Estimated to Realize for Unsecured Creditors
Chotillon Beam Scale	48.50	
Above five items subject to condi- tional sales contract, 1st Nat'l Bk.	912.75	
Various small items of small tools and equipment	186.96	
No estimated of value available, full cost used		186.96
Various small items of office equipment.....	54.62	
Appraised value August 23, 1948.....		20.00
Organization Expense	72.69	0.00
	<hr/>	<hr/>
Totals.....	7,858.12	1,965.54
 Total Owed to Unsecured Creditors.....		3,357.39
Total Estimated to Realize for Unsecured Creditors		1,965.54
		<hr/>
Deficiency to Unsecured Creditors.....		1,391.85

LIABILITIES

	Book Value	Owed to Unsecured Creditors
Secured Creditors:		
1st Nat'l Bank—Loan on Chevrolet Truck..	615.96	0.00
1st Nat'l Bank—Conditional Sales Contract	1,278.00	0.00
1st Nat'l Bank—Conditional Sales Contract	912.75	0.00
(Above claims deducted contra from spe- cific assets listed as security)—Balance unsecured		0.00
Arizona Industrial Commission.....	56.18	
(Deducted contra, see deposits).....		0.00
Collector of Internal Revenue.....	167.00	167.00
Arizona Tax Commission, Sales Tax.....	15.65	15.65
Accounts Payable—per books, adjusted to 3-24-48	2,968.15	2,968.15

	Book Value	Owed to Unsecured Creditors
Secured Creditors:		
Loans from stockholders	80.10	80.10
Unrecorded Liability, for which claim has been filed:		
Jack Long—Salary 3-15-48 to 4-22-48	\$493.31	
Pro-rated to 3-24-48	0.00	126.49
CAPITAL		
Capital Stock	4,500.00	0.00
Book Deficit	2,735.67*	0.00
Totals.....	7,858.12	3,357.39

* Figures in red.

[Title of District Court and Cause.]

PETITION FOR FINDING OF FACT

Petitioner, Trustee in Bankruptcy of the above mentioned estate, respectfully alleges as follows:

I.

That on March 1, 1948, the Maricopa Packing Company, a corporation, filed an action Division No. 5 of the Superior Court of the State of Arizona, in and for the County of Maricopa, being Docket No. 59975, said action being a suit on unsecured claim against the Northern Meat Company, Inc., a corporation, for merchandise sold and delivered to said corporation, the now bankrupt, that such suit was in the amount of Five Hundred and Ninety-four and 12/100 Dollars (\$594.12).

II.

That on or about March 24, 1948, the Northern Meat Company, Inc., Defendant, now bankrupt, filed its answer; that on March 25, 1948, the Maricopa Packing Company, Plaintiff, caused a Writ of Garnishment to issue in said action; directed to the First National Bank of Arizona, Phoenix; that said garnishee filed its answer in said action on March 27, 1948, disclosing that it had in its possession the sum of Eight Hundred Five and 87/100 Dollars (\$805.87) of said Defendant, as a depositor of said garnishee and that it also had in its possession the sum of Two Hundred Eleven and 50/100 Dollars (\$211.50) of the said Defendant in a special account with the said garnishee; that the above-entitled action was set for trial on August 5, 1948; that on July 2, 1948, the Defendant filed its petition in bankruptcy in the United States District Court for the District of Arizona, and was thereafter adjudged a bankrupt; that your petitioner was duly appointed Trustee in said bankruptcy proceeding.

III.

That on August 5, 1948, attorney for the Plaintiff, Maricopa Packing Company, the attorney for the now bankrupt, Northern Meat Company, Inc., and the Trustee, representing himself without an attorney, appeared before the above-mentioned Superior Court. The attorney for the Plaintiff filed a memorandum brief, the gist of which was that the Writ of Garnishment of the Plaintiff was valid, at least

until such time as the Trustee could affirmatively show that the now bankrupt was in fact insolvent at the time the Writ of Garnishment was obtained, it being admitted that said Writ of Garnishment was obtained within four (4) months prior to the filing of the petition in bankruptcy by the now bankrupt.

IV.

That your petitioner thereupon entered an oral motion for leave to intervene, which was granted; that it was then stipulated by all parties in open court that the issue as to whether the now bankrupt was insolvent at the time the Writ of Garnishment was granted should be resolved by the Referee in Bankruptcy; wherefore, the Court set the date of August 20, 1948, for a final hearing as to whether the said Writ of Garnishment should be set aside, based upon the finding of the Referee, or upon a finding of the District Court upon appeal as the fact of the now bankrupt's insolvency at the time the Writ of Garnishment was obtained.

Wherefore, your petitioner prays a finding by the Referee that the Northern Meat Company, Inc., now bankrupt, was insolvent on March 24, 1948, the date on which the garnishments in question were perfected.

/s/ DONALD B. SHORTRIDGE,
As Trustee only for the Estate of Northern Meat
Company, Inc., bankrupt.

State of Arizona,
County of Maricopa—ss.

I, Donald B. Shortridge, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my knowledge, information and belief.

/s/ DONALD B. SHORTRIDGE,
Petitioner.

Subscribed and sworn to before me this 23rd day of August, 1948.

(Seal) /s/ GLADYSE L. ARMSTRONG,
Notary Public.

My commission expires: July 17, 1949.

[Endorsed]: Filed Aug. 23, 1948.

In the United States District Court
for the District of Arizona

In Bankruptcy—No. B-1215 Phx.

In the Matter of NORTHERN MEAT COMPANY,
INC., Bankrupt.

REFeree'S FINDING OF FACT

A petition having been filed by the Trustee in the above-mentioned bankruptcy on the 17th day of August, 1948, praying that the undersigned Referee find as a fact that the aforesaid bankrupt was insolvent on March 25, 1948, within the meaning of the Federal Bankruptcy Act as Amended,

and said petition having been duly considered, together with the attached profit and loss statement, and having considered the values of the various assets as indicated by an appraisal made thereof on file in this office;

It is found that the bankrupt corporation in this case was insolvent on March 25, 1948, in that the aggregate of its property exclusive of any property which it, through its officers may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay its creditors, was not, at a fair valuation, sufficient in amount to pay its debts.

/s/ STANLEY A. JERMAN,
Referee.

[Endorsed]: Filed October 2, 1948.

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME FOR FILING PETITION FOR
REVIEW

It is hereby stipulated and agreed by Donald B. Shortridge, trustee, in the matter of Northern Meat Company, Inc., bankrupt, and Kramer, Morrison, Roche & Perry, attorneys for Maricopa Packing Company, lien creditor of the said bankrupt, that the time for filing of a petition for review of that certain order made and entered by the referee

herein in the above entitled matter on the 25th day of September, 1948, finding that the above named bankrupt was insolvent on March 25, 1948, be and the same is extended to and including Friday, the 22nd day of October, 1948, for the reason that the reporter taking the testimony on the hearing in the above mentioned petition on the 25th day of September, 1948, is unable to furnish a transcript of the testimony taken at said hearing at this time and will be unable to furnish said transcript within the ten day period within which a petition for review is required to be filed in accordance with Rule No. 51 of the Rules of Practice for the United States District Court for the District of Arizona.

Dated at Phoenix, Arizona, this 1st day of October, 1948.

/s/ DONALD B. SHORTRIDGE,
Trustee for the above named bankrupt.

KRAMER, MORRISON, ROCHE & PERRY,
Attorneys for Maricopa Packing Company, Lien
Creditor.

By /s/ L. V. RHUE,

ORDER

Upon reading the above and foregoing stipulation and good cause appearing therefor, it is ordered that the time for the Maricopa Packing Company to file a petition for review of that certain order entered herein on the 25th day of September, 1948, finding that the above named bankrupt was in-

solvent on March 25, 1948, be and the same is hereby extended to and including Friday, the 22nd day of October, 1948.

Dated at Phoenix, Arizona this 1 day of October, 1948.

/s/ STANLEY A. JERMAN,
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 1, 1948.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To Stanley A. Jerman, Referee in Bankruptcy:

The petition of Maricopa Packing Company, an Arizona corporation, respectfully represents:

1. Your petitioner is aggrieved by the order, and finding of fact, herein of Stanley A. Jerman, Referee in Bankruptcy, dated September 25, 1948, finding that said bankrupt was insolvent on the 25th day of March, 1948, a copy of which order is annexed hereto, marked Exhibit A and made a part hereof.

2. The referee erred in respect to said order, and finding of fact, in that referee's finding that the bankrupt was insolvent on the 25th day of March, 1948, was without authority for the reason that there is no allegation of insolvency of the bankrupt on the 25th day of March, 1948, in the petition for finding of fact filed by the trustee herein on the 23rd day of August, 1948, or of the conditions upon which the lien of the garnishment

of the Maricopa Packing Company against the Northern Meat Company, Inc., bankrupt herein, attached on the 25th day of March, 1948, in cause No. 59975, in the Superior Court of the State of Arizona, in and for the County of Maricopa, wherein Maricopa Packing Company, a corporation, is plaintiff, and Northern Meat Company, Inc., a corporation, is defendant, is to be avoided.

3. The referee erred in respect to said order, and finding of fact, in that there is no allegation or proof by the trustee of the conditions upon which the aforesaid lien of garnishment, obtained March 25, 1948, is to be avoided.

4. The referee erred in respect to said order, and finding of fact, in that the referee's finding that the bankrupt was insolvent on the 25th day of March, 1948, was without evidence of the value or appraisement of the assets of the bankrupt on said 25th day of March, 1948.

5. The referee erred in respect to said order, and finding of fact, in that the referee's finding that the bankrupt was insolvent on the 25th day of March, 1948, was based solely upon the testimony and financial report of Laird A. Racey, Certified Public Accountant, who stated positively that his report and testimony was limited to the financial status of the bankrupt, as reflected by the books of said bankrupt on the 25th day of March, 1948, and that he was not competent to evaluate the assets of the bankrupt on said date and that the report made by him and filed as evidence herein was a financial report; that it was not an appraisal;

and that it was a report of book values of the bankrupt on said 25th day of March, 1948.

6. The referee erred in respect to said order, and finding of fact, in that at the hearing before the trustee on the 25th day of September, 1948, he admitted over objection of your petitioner, the testimony of Laird A. Racey, CPA, and the financial statement prepared by said Racey on September 20, 1948, purporting to show the financial condition of the bankrupt, as evidence of value of the assets of the bankrupt on the 25th day of March, 1948.

7. That the referee erred in respect to said order, and finding of fact, in that his finding is contrary to the facts set forth in the petition for finding of fact in that the balance sheets of said bankrupt for the 24th and 25th days of March, 1948, attached to said petition as a part thereof, show that the assets of the bankrupt exceeded its liabilities, copies of which balance sheets are attached hereto marked Exhibits B and C respectively.

8. That the referee erred in respect to said order, and finding of fact, in that his finding is contrary to the law and the evidence.

Wherefore, your petitioner prays that said order, and finding of fact, be reviewed by a Judge, in accordance with the provisions of the Act of Congress relating to Bankruptcy; that said order be reversed, that petitioner be declared to have a good and valid prior lien under the Writ of Garnishment issued on the 25th day of March, 1948,

in the above entitled and numbered cause of the Superior Court of the State of Arizona in and for the County of Maricopa, and that your petitioner have such other and further relief as is just.

Dated at Phoenix, Arizona, this 15th day of October, 1948.

MARICOPA PACKING COMPANY, INC.

By /s/ IRMA LINSENMEYER,
Secretary.

KRAMER, MORRISON, ROCHE & PERRY,
Attorneys for Petitioner.

By /s/ L. V. RHUE,
(Acknowledgment of Service.)

EXHIBIT A

In the United States District Court for
the District of Arizona

In Bankruptcy—No. B-1215 Phx.

In the Matter of NORTHERN MEAT COMPANY,
INC., Bankrupt.

REFEREE'S FINDING OF FACT

A petition having been filed by the trustee in the above-mentioned bankruptcy on the 17th day of August, 1948, praying that the undersigned Referee find as a fact that the aforesaid bankrupt was insolvent on March 25, 1948, within the meaning of the Federal Bankruptcy Act as Amended, and said petition having been duly considered, together with

the attached profit and loss statement, and having considered the values of the various assets as indicated by an appraisal made there of on file in this office;

It is found that the bankrupt corporation in this case was insolvent on March 25, 1948, in that the aggregate of its property exclusive of any property which it, through its officers may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay its creditors, was not, at a fair valuation, sufficient in amount to pay its debts.

/s/ STANLEY A. JERMAN,
Referee.

EXHIBIT B

NORTHERN MEAT COMPANY, INC.

BALANCE SHEET—March 24, 1948

ASSETS

Cash on Hand (Overdraft).....	\$	10.61*
Cash in Bank		805.87
Deposits:		
Industrial Commission—Insurance	\$	107.00
Sales Tax License		1.00
Light and Water Deposit.....		25.00
		133.00
Accounts Receivable		8.10
Unpaid Checks Receivable		164.24
Office Equipment:		
Cash Box	\$	5.60
Cash Box		3.78
Pencil Sharpener		2.75
Numbering Machine		28.80
Invoice Holder		13.69
		54.62
Shop Equipment:		
Sanitary Chopper	\$	485.00
Federal Steak Maker		237.50
Sanitary Scales		247.50
Vaughan Meat Saw		595.00
Chatillon Beam Scale		48.50
Walk-in Refrigerator		2,544.53
Small tools and equipment.....		186.96
		4,344.99
Truck—1940 Chevrolet		1,001.00
Organization Expense		72.69
Prepaid Interest:		
First National Contract No. EF 3538.....	\$	133.60
First National Contract No. EF 3580.....		95.30
First National Contract No. PLB 14676.....		69.95
		298.85
Prepaid Insurance:		
On Truck	\$	117.52
On Equipment		155.71
		273.23
Total Assets.....	\$	7,145.98

Exhibit B—(Continued)

LIABILITIES

Invoices Payable	\$3,590.03	
Notes Payable—First National Bank:		
Contract No. EF 3538—Principal.....	\$2,219.25	
Contract No. EF 3538—Interest	133.60	
	<hr/>	
	\$2,352.85	
Less Payments	1,074.85	1,278.00
	<hr/>	
Contract No. EF 3580—Principal.....	\$1,508.80	
Less Payments	596.05	912.75
	<hr/>	
Contract No. PLB 14676—Principal.....	\$ 700.00	
Contract No. PLB 14676—Interest	69.95	
	<hr/>	
	\$ 769.95	
Less Payments	\$ 153.99	615.96
	<hr/>	
Arizona Sales Tax Payable.....		15.65
Payroll Taxes Payable:		
Social Security Tax Payable.....	\$ 122.50	
Withholding Tax Payable.....	44.50	
Industrial Commission	53.36	220.36
	<hr/>	
Loans from Stockholders:		
C. V. Winn	\$ 39.38	
Dallas P. Richeson	23.07	
L. K. Dooley	28.20	90.65
	<hr/>	
Total Liabilities.....		\$6,723.40

NET WORTH

Capital Stock (At Par)	\$4,500.00	
Less Deficit	4,077.47	\$ 422.58
	<hr/>	
Total Liabilities and Net Worth.....		\$7,145.98

EXHIBIT C

NORTHERN MEAT COMPANY, INC.

BALANCE SHEET—March 25, 1948

ASSETS

Cash on Hand	\$	47.39*
First National Bank of Arizona—Head Office.....	\$835.26	
First National Bank of Arizona—1st Branch....	29.18	864.44
<hr/>		
Petty Cash		25.00
Customers Accounts—Unpaid		8.10
Returned Checks from Bank—Unpaid.....		164.24
Prepaid Insurance		273.23
Prepaid Items—Interest charged for contracts in advance		298.85
Utility and Other Deposits.....		93.98
Equipment—Automotive		1,021.00
Equipment—Office		54.62
Equipment—Shop		4,309.56
Organization Expense		72.69
<hr/>		
Total Assets.....	\$7,138.32	

LIABILITIES

Invoices Payable	\$3,735.69
Installment Contracts Payable.....	2,806.71
Arizona State Tax Commission—Sales Tax Division.....	15.65
Collector of Internal Revenue.....	167.00
Industrial Commission of Arizona.....	53.36
Loans from Stockholders.....	80.10
<hr/>	
Total Liabilities.....	\$6,858.51

NET WORTH

Capital Stock—Fully paid and non-assessable—	
Outstanding—At Par	\$4,500.00
Deficit	4,220.19
<hr/>	
Total Liabilities and Net Worth.....	\$7,138.32

[Endorsed]: Filed 10/15/48.

In the United States District Court
for the District of Arizona

October 1948 term

at Phoenix

Minute Entry of Monday, October 25, 1948
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

Referee's Certificate on Petition for Review of
Maricopa Packing Company comes on regularly
for hearing this day. No appearance is made on be-
half of the parties herein.

It is ordered that said matter be submitted on
authorities heretofore filed and taken under ad-
visement.

In the United States District Court
for the District of Arizona

October 1948 Term

At Phoenix

Minute Entry of Wednesday, January 12, 1949
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

The Referee's Certificate of Petition for Review
of Maricopa Packing Company having been sub-
mitted and taken under advisement,

It is ordered that the Referee's order and finding
of fact dated September 25, 1948, be and it is af-
firmed. (Docketed 1/12/49.)

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Maricopa Packing Company, a creditor and lien claimant of and against the above named bankrupt and its estate, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the United States District Court for the District of Arizona entered the 12th day of January, 1949, wherein and whereby the order of the Referee in Bankruptcy entered September 25, 1948, is affirmed.

KRAMER, MORRISON, ROCHE & PERRY,
Attorneys for Appellant.

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed Feb. 7, 1949.

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents:

That Maricopa Packing Company, an Arizona corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to become and be sole surety upon bonds required in the courts of the United States, as Surety, are held and firmly bound unto Donald B. Shortridge, as Trustee in Bankruptcy of Northern Meat Company, Inc., a bankrupt, in the penal sum of Two Hundred Fifty Dollars (\$250), for the payment of which said sum

well and truly to be made said principal and surety bind themselves, and their respective successors, jointly and severally, firmly by these presents.

The condition of this obligation is such that

Whereas, under date of the 12th day of January, 1949 an order was entered in the above entitled court, affirming the order of the Referee in Bankruptcy previously entered the 25th day of September, 1948, and the principal obligor herein has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order entered by said United States District Court the 12th day of January, 1949, as aforesaid.

Therefore, is the said principal obligor shall pay the costs that may be assessed against it if said appeal is dismissed, or the order appealed from affirmed, or such costs as the appellate court may award if the order appealed from is modified, then this obligation shall be void, otherwise to remain in full force, effect and virtue.

Witness the corporate name of the principal obligor, by its duly authorized attorney, and the corporate name and seal of the surety, by its duly authorized attorney in fact, this 7th day of February, 1949.

MARICOPA PACKING COMPANY,

By /s/ ALLAN K. PERRY,

Its Attorney.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

(Seal) By /s/ C. A. HAMMOND,

Its Attorney-in-Fact.

[Endorsed]: Filed Feb. 7, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
UPON APPEAL

The appellant, Maricopa Packing Company, hereby designates the following portions of the record to be certified and transmitted to the United States Court of Appeals for the Ninth Circuit, to-wit:

1. Certificate on Petition for Review, filed October 18, 1948, and the following papers annexed to such certificate:

(a) Petition for finding of fact, filed with the referee by the trustee in bankruptcy;

(b) Referee's finding of fact;

(c) Stipulation and order extending time for filing petition for review;

(d) Petition for review (omitting Exhibits A, B and C therefrom, as the same are duplicated by other documents included in this designation);

(e) Trustee's Exhibit A (statement of financial condition);

(f) Transcript of testimony taken before referee September 25, 1948 and filed with the referee October 15, 1948;

2. All minute orders entered by the Clerk in the above entitled matter, on or subsequently to October 18, 1948.

3. Notice of Appeal filed concurrently herewith.

4. Bond on Appeal filed concurrently herewith.
5. Statement of points upon which appellant intends to rely upon its appeal, filed concurrently herewith.
6. This designation.

PRAMER, MORRISON, ROCHE & PERRY,
Attorneys for Appellant.

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed Feb. 7, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY
UPON ITS APPEAL

Maricopa Packing Company, who, concurrently with the filing of this statement, has perfected its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the United States District Court for the District of Arizona entered the 12th day of January, 1949, wherein and whereby the order of the Referee in Bankruptcy entered September 25, 1948 is affirmed, intends to rely upon the following points upon its appeal to said United States Circuit Court of Appeals, viz.:

1. That the purported finding of fact by the referee, to the effect that the bankrupt was insolv-

ent on the 25th day of March, 1948 is not supported by any evidence.

2. All of the evidence before the referee, taken in the light most favorable to the trustee, shows that the bankrupt was solvent on March 25, 1948.

3. The petition for finding of fact filed by the trustee does not allege that the bankrupt was insolvent on the 25th day of March, 1948. The referee erred and the District Judge erred in affirming the referee's order, because at the hearing before the referee on the 25th day of September, 1948, he admitted in evidence, over the objection of this appellant, the testimony of Laird A. Racey and the financial statement prepared by the said Racey on September 20, 1948 purporting to show the financial condition of the bankrupt as of that date as evidence of the value of the assets of the bankrupt on the 25th day of March, 1948.

4. The referee erred with respect to his finding of fact and order of September 25, 1948, in that such finding is contrary to the facts set forth in the "Petition for Finding of Fact" filed by the referee in that the balance sheets of said bankrupt for the 24th and 25th days of March, 1948, attached to the said petition as a part thereof, show affirmatively that the assets of the bankrupt exceeded its liabilities on those dates.

5. The District Judge erred in failing and refusing to enter an appropriate order to the effect that this appellant has a good and valid prior lien under the writ of garnishment issued on the 25th

day of March, 1948, out of the Superior Court of the State of Arizona in and for the County of Maricopa, referred to in these proceedings.

KRAMER, MORRISON, ROCHE & PERRY,
Attorneys for Appellant.

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed Feb. 7, 1949.

In the United States District Court
for the District of Arizona

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in case No. B-1215 Phoenix In the Matter of Northern Meat Company, Inc., Bankrupt, on the docket of said Court.

I further certify that the foregoing documents, to-wit:

1. Referee's Certificate on Petition for Review, and Record on Review described therein and attached thereto, filed October 18, 1948;
2. Minute entry of October 25, 1948;
3. Minute entry of January 12, 1949;
4. Notice of Appeal, filed February 7, 1949;

5. Bond on Appeal, filed February 7, 1949;
6. Statement of Points upon which appellant intends to rely upon its appeal, filed February 7, 1949;
7. Designation of Contents of Record Upon Appeal, filed February 7, 1949;
8. Trustee's Petition for Finding of Fact, filed with the referee August 23, 1948 and with the District Court February 23, 1949 are the original documents filed in said case and designated in the appellant's Designation of Contents of Record Upon Appeal, excepting the minute entries entered by the clerk, and that the foregoing copies of minute entries of October 25, 1948 and January 12, 1949 are true and correct copies of the originals thereof remaining in my office.

I further certify that the clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$1.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 23rd day of February, 1949.

(Seal) /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]. No. 12193. United States Court of Appeals for the Ninth Circuit. Maricopa Packing Company, Appellant, vs. Donald B. Shortridge, Trustee in Bankruptcy of the Estate of Northern Meat Company, Inc., Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed February 25, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12193

In the Matter of NORTHERN MEAT COMPANY,
INC., Bankrupt.

MARICOPA PACKING COMPANY,

Appellant,

vs.

DONALD B. SHORTRIDGE, as Trustee in Bank-
ruptcy of Northern Meat Company, Inc.,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD TO BE
PRINTED.

1. Appellant intends to rely upon the points set forth in its "Statement of Points Upon Which

Appellant Intends to Rely Upon Its Appeal," heretofore filed in the District Court and included in the record transmitted to this Circuit Court of Appeals.

2. Appellant designates for printing herein the entire record, except Exhibits A, B and C attached to the "Petition for Review," as such exhibits are duplicated by other documents included in the record.

/s/ ALLAN K. PERRY.

/s/ L. V. RHUE,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed February 25, 1949. Paul P. O'Brien, Clerk.

**In the
United States
Court of Appeals
For the Ninth Circuit**

MARICOPA PACKING COMPANY,

Appellant,

vs.

DONALD B. SHORTRIDGE, Trustee in Bankruptcy of the Estate of Northern Meat Company, Inc., Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANT

KRAMER, MORRISON, ROCHE & PERRY,
309 First National Bank Bldg.,
Phoenix, Arizona,

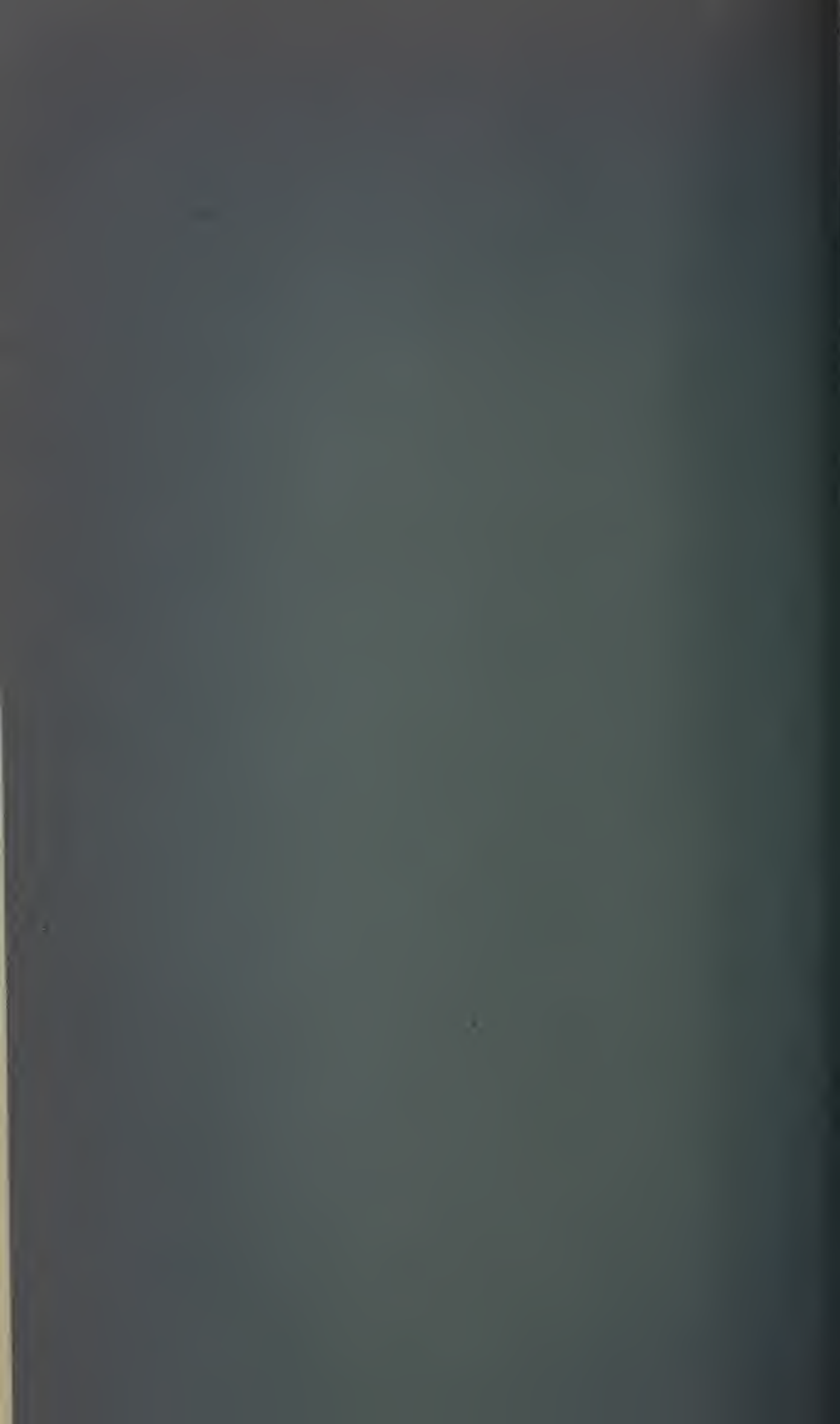
Attorneys for Appellant.

FILED

APR 18 1949

PAUL P. O'BRIEN,

CLERK



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No. 12193

**In the
United States
Court of Appeals
For the Ninth Circuit**

MARICOPA PACKING COMPANY,

Appellant,

vs.

DONALD B. SHORTRIDGE, Trustee in Bankruptcy of the Estate of Northern Meat Company, Inc., Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANT

STATEMENT RELATIVE TO JURISDICTION

This is an appeal from an order entered by the United States District Court for the District of Arizona, in a controversy arising in a proceeding in bankruptcy. The amount involved exceeds five hundred dollars.

Jurisdiction of the District Court is conferred by Section 2 of the Bankruptcy Act (Section 11, Chapter 2, Title 11 U. S. C.) and the jurisdiction of the United States Court of Appeals is invoked under Section 24(a) of the Bankruptcy Act (Section 47, Chapter 4, Title 11 U. S. C.)

STATEMENT OF THE CASE

Appellee, Trustee in Bankruptcy of Northern Meat Company, Inc., a bankrupt, filed with the Referee a "Petition for Finding of Fact" (T. R. 31-34) in which he alleged:

(a) March 1, 1948, Maricopa Packing Company commenced an action in the Superior Court of Maricopa County against Northern Meat Company, Inc., to recover five hundred ninety-four and 12/100 dollars. (T. R. 31.)

(b) March 25, 1948, a writ of garnishment issued out of such state court in said cause, and was served upon First National Bank of Arizona, Phoenix, where Northern Meat Company, Inc., had deposits aggregating one thousand seventeen and 37/100 dollars. Such funds were sequestered by the writ and impressed with a lien in favor of Maricopa Packing Company. (T. R. 32.)

(c) July 2, 1948, within four months of the date of the levy of such writ of garnishment, Northern Meat Company, Inc., was adjudicated a bankrupt. (T. R. 32.)

By such petition, the Trustee prayed that the Referee find affirmatively that Northern Meat Company, Inc., was actually insolvent on March 25, 1948, when its funds were sequestered by the writ of garnishment. (T. R. 33.)

If Northern Meat Company, Inc., was actually insolvent when said writ of garnishment was served, then under Section 67(a)(1) of the Bankruptcy Act (Section 107, Chapter 7, Title 11 U. S. C.) the lien of the writ must fail, it being conceded that the writ was served within four months of the date of the filing of the petition in bankruptcy.

Maricopa Packing Company appeared in opposition to the Trustee's petition (T. R. 3) and evidence was adduced before the Referee. (T. R. 3-31.) The Referee found as a fact that Northern Meat Company, Inc., was insolvent on the date the writ of garnishment was issued and served, (T. R. 35) and his order was affirmed, upon review by the District Judge, (T. R. 45) and this appeal perfected by the creditor Maricopa Packing Company. (T. R. 46-47.)

SPECIFICATION OF ERRORS

1. The District Court erred in affirming the order of the Referee, because the purported finding of fact by the Referee to the effect that the bankrupt was insolvent on March 25, 1948, is not supported by, and is contrary to, the evidence.

2. The District Court erred in affirming the order of the Referee, because all of the evidence before the Referee, taken in the light most favorable to the Trustee, establishes that the bankrupt was solvent on March 25, 1948.

3. The District Court erred in affirming the order of the Referee, because at the hearing before the Referee upon the petition of the Trustee, the Referee admitted in evidence, over the objection of appellant, the testimony of one Laird A. Racey and the financial statement prepared by Racey on September 20, 1948, as evidence of the value of the assets of the bankrupt on March 25, 1948. Such evidence was clearly incompetent.

4. The District Court erred in affirming the order of the Referee, because the finding of fact made by the Referee is contrary to the averment contained in the "Petition for Finding of Fact" filed by the Trustee,

in that the balance sheets of the bankrupt for the 24th and 25th days of March, 1948, attached to said petition and made a part thereof, show affirmatively that the assets of the bankrupt exceeded its liabilities on those dates.

5. The District Court erred in failing and refusing to enter an appropriate order to the effect that this appellant has a good and valid prior lien under the writ of garnishment issued out of the Superior Court of Maricopa County, Arizona, on March 25, 1948, upon the funds of the bankrupt on deposit with the First National Bank of Arizona, Phoenix.

SUMMARY OF ARGUMENT

1. The statute relating to invalidity of liens against property of debtor, obtained by legal process within four months before the filing of the petition in bankruptcy, applies only if the debtor was insolvent when the lien was acquired. If the debtor was not then insolvent, the lien is valid although it was obtained within the four months period.

2. The test in determining the solvency of a corporate debtor is whether its assets, fairly valued, exceed its liabilities, disregarding liability to stockholders.

3. There is no evidence of the insolvency of the debtor upon the date the writ of garnishment was levied.

ARGUMENT

1. **The Statute Relating to Invalidity of Liens Against Property of Debtor, Obtained by Legal Process Within Four Months Before the Filing of the Petition in Bankruptcy, Applies Only if the Debtor was Insolvent When the Lien was Acquired. If the Debtor was Not Then Insolvent, the Lien Is Valid Although it was Obtained Within the Four Months' Period.**

In *Taubel-Scott-Kitzmiller Co. vs. Fox*, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770, it is said:

“For the statute does not, as a matter of substantive law, declare void every lien obtained through legal proceedings within four months of the filing of the petition in bankruptcy. The lien may be valid, because the debtor was, in fact, solvent at the time the levy was made.”

To the same general effect, see *Liberty National Bank vs. Bear*, 265 U. S. 365, 44 S. Ct. 499, 68 L. Ed. 1057.

2. The Test in Determining the Solvency of a Corporate Debtor is Whether Its Assets, Fairly Valued, Exceed Its Liabilities, Disregarding Liability to Stockholders.

Section 67-d-(1) of the Bankruptcy Act (Section 107-d-1, Chapter 7, Title 11, U. S. C.) thus defines insolvency:

“ . . . a person is ‘insolvent’ when the present fair salable value of his property is less than the amount required to pay his debts.”

In speaking of a somewhat similar provision in the Bankruptcy Act, the Court of Appeals for the Eighth Circuit, in *Arkansas Oil & Mining Co. vs. Murray Tool & Supply Co.*, 127 F. 2d 564, said:

“Insolvency, under the act here involved, must be determined according to whether or not the aggregate of a person’s property at a fair valuation is sufficient to pay his debts. There is no specific finding as to the value of the aggregate of appellant’s assets, either at the time of the commission of the alleged acts of bankruptcy, or at the time of filing the involuntary petition. True, there is a conclusion embodied in the referee’s so-called findings, but it ought specifically to appear that this conclusion is based upon the essential elements constituting insolvency.”

The capital stock of a corporation is not to be considered as a liability in determining its solvency.

Stitzer Hotel Co. vs. Beyer (C. C. A. 3) 55 F. 2d 620;

Curtis vs. Dade County Security Company (C. C. A. 5) 30 F. 2d 325;

In Re Cleveland Discount Company (D. C. Ohio) 9 F. 2d 97.

3. There Is No Evidence of the Insolvency of the Debtor Upon the Date the Writ of Garnishment was Levied.

It is submitted that there is no proof in the record to the effect that on March 25, 1948, the "fair salable value of the debtor's property was less than the amount required to pay its debts."

The "book values" (T. R. 29-31) showed the debtor to be solvent on that date.

The Trustee attempted to prove insolvency by the testimony of an accountant who admitted, in both the written report that he filed with the Referee (T. R. 26-28) and in his testimony, (T. R. 10) that "I have made no attempt to appraise the assets."

While the proceedings before the Referee were somewhat informal, they were reported and tran-

scribed, and it is believed that the following excerpts may be of some assistance to the court in understanding the theory of the Referee and the Trustee, which seems to have been that because some of the assets were sold months after the garnishment lien had attached, for very low prices, such fact in and of itself established the debtor's insolvency at the date the writ was issued and served.

During the testimony of the witness, Laird A. Racey, the following transpired:

"A. In explaining that I would like to refer back to the report, the last sentence on Page 1 of the report. I stated I have made no attempt to appraise the assets but have adopted those values which, in my opinion, most clearly reflect their true realizable value. Upon final disposition the Chevrolet truck and large items of equipment did not realize anything over and above the loans against them. It is my belief that the best measure of realizable value of any item is the amount realized at a sale. I have therefore used these figures in determining the realizable value of the truck and large items of equipment.

"MR. RHUE: You know when that truck was disposed of?

"THE WITNESS: I do not have the exact date, it was sold at an auction subsequent to March 24th.

“MR. RHUE: This Northern Meat Company was a going concern on the 24th of March?

“A. That is right.

“MR. RHUE: And that was an asset in use with the company at that time?

“A. Yes, sir.

“MR. RHUE: We object to this evidence, your Honor, as being immaterial here. It was a going concern, it had the assets and if it had been sold subsequent thereto that can be no evidence of value on the 24th of March.

“MR. SHORTRIDGE: We submit the amount on the books is not what we are getting. The question is what that truck would have realized had it been sold on March 25th.

“THE REFEREE: The market value.

“MR. SHORTRIDGE: Yes.

“THE REFEREE: The objection is overruled.

“MR. RHUE: If your Honor please, that truck at that time when it was in use by the company and a going concern was certainly more valuable than subsequently when it went out of business.

“THE REFEREE: I don't think so, the market value would be exactly the same.

“MR. RHUE: Furthermore, the estimate is made here by the auditor, he isn't qualified to

make such an appraisal. I object to any testimony he puts on as an appraiser, he is not qualified to appraise these properties at that time.

“THE REFEREE: He is giving testimony upon which he based his conclusion and it is up to me to pass on the weight or whether it is right or not.

“MR. SHORTRIDGE: I submit this is quite commonly submitted by certified public accountants. He is only presenting these figures for what they are worth.

“THE REFEREE: Go ahead.

“MR. SHORTRIDGE: I am further prepared to show, your Honor, if necessary in this thing the truck was later sold at a loss.

“THE REFEREE: You are the trustee?

“MR. SHORTRIDGE: Yes.

“THE REFEREE: You make that statement as a trustee, as an officer of this court?

“MR. SHORTRIDGE: I will make the statement, a letter was received by me from the Assistant Manager of the First National Bank, August 25th, 1948, in which it was stated that the bank received the truck on May 26th, 1948, the amount of lien at that time—

“MR. RHUE: Just a minute, that is subsequent to March 24th.

“THE REFEREE: I will consider that.

“MR. RHUE: It would be a new asset after that.

“MR. SHORTRIDGE: That goes to the weight, not the admissibility. If this truck were bought on March 27th it would have stronger weight than if sold in May.

“THE REFEREE: Go ahead. In other words, the truck was sold in May at a loss.

“MR. SHORTRIDGE: That is correct.

“THE REFEREE: All right, as an officer of the Court here you make that statement. I will take it for what it is worth. Anything else?

“MR. RHUE: I will object to this evidence because it is just the opinion of the bank, it is not worth anything, it is not evidence.

“MR. SHORTRIDGE: I don't know, they state in this letter they sold it at a loss. It says, 'The public auction was held on June 26th, 1948, at the Arcade Garage and was purchased by the First National Bank for \$615.96.'

“THE REFEREE: Did you discuss this with the bank?

“MR. SHORTRIDGE: No, I requested a letter.

“THE REFEREE: Go ahead.

“MR. SHORTRIDGE: 'The truck was sold July 27th, 1948, to the Arizona Truck Sales and Service for \$575.52, from which was deducted the

storage of \$24.48, leaving a net of \$551.04. The bank made no profit on this sale, in fact, we lost money. Trusting this information is sufficient, Very truly yours.' Signed by C. W. Morris, Assistant Manager.

"THE REFEREE: Do you want to raise the—

"MR. RHUE: It is not admissible as to value.

"MR. SHORTRIDGE: If this is not admissible as to the value of the car, then what evidence is admissible?

"THE REFEREE: I will consider. Proceed.

"MR. SHORTRIDGE: You have here listed a number of assets, a Sanitary Scale, a Vaughn meat saw, a Chotillon beam scale and so on with an offset to the conditional sales contract leaving a balance of nothing for unsecured creditors. How did you arrive at that figure?

"A. That item and also the walk-in freezing box above here were subject to conditional sales contracts held by the First National Bank. Upon final disposition they did not realize anything over and above the amount owed by them.

"MR. RHUE: When was that final disposition?

"A. It was by court order.

"MR. RHUE: Do you recall the approximate date?

“A. Around September 1st, I believe.

“MR. RHUE: Of this year?

“A. That is right.

“MR. RHUE: I object there as to this evidence not being permissible as of value of the 24th of March.

“THE REFEREE: That was August 14, 1948.

“MR. SHORTRIDGE: Again we say this evidence should be considered and the question here is one of weight and not admissibility.

“THE REFEREE: All right, proceed.

“Q. (By MR. SHORTRIDGE): You have addition of small tools and equipment, no estimate available, in other words, you estimate—

“A. In preparation of the statement I have tried to be as conservative as possible and in this particular item I could not ascertain that it was included on the appraisal sheet, nor could I find any means whatsoever of determining what the value might be, therefore, I have used the full book value, although it is my opinion they probably would not have produced that much.

“Q. The various small item of office equipment, \$20, where did you get that?

“A. For lack of any other figure that is the figure that was used on the appraisal for the purpose of the trustees.

“Q. (By MR. RHUE): What appraisal are you referring to?

“A. I believe Mr. Green’s.

“MR. RHUE: When?

“A. On August 23rd, 1948.

“MR. RHUE: Not as of March 24th, 1948?

“A. As far as I know there was none available as of March 24th, 1948, had there been I would have used it.” (T. R. 10-15.)

“MR. RHUE: A used truck right now would cost more than a new truck.

“THE REFEREE: Not now, there has been a terrific change in property this year, the bottom has dropped out.

“MR. RHUE: That was not the condition on March 24th.

“THE REFEREE: Oh, yes, it was, it has been the condition since early this year. That has been the history of the bankruptcy here. I think the Court can take judicial notice that that condition has changed the last six months. Go ahead, anything further?” (T. R. 21-22.)

“Q. (By MR. RHUE): Did you see this property on the 24th of March?

“A. I did not.

“Q. Did you see it at any time?

“A. I did not.

“MR. RHUE. We object to any evidence offered here as to the value of this property.

“THE REFEREE: Objection overruled.

“Q. (By MR. RHUE): Now in this procedure the books didn't reflect any depreciation or any other charges other than shown in your report?

“A. That is true.

“Q. And according to the books the values of the properties as of March 24th is \$7800?

“A. That is true.

“Q. And that the liabilities were approximately \$1700 less?

“A. That is correct.

“Q. Now while you have set up here and shown that some of these assets were held under conditional sales contracts, isn't it possible that property could have been sold on that date or for a time very near that date for something realized over and above the balance due on the contracts?

“A. As a matter of opinion I do not believe I am qualified to answer that.

“Q. But the company would have equities in there to the extent of what they had paid on that property?

“A. That is right.” (T. R. 23).

“Q. If this company were to go to the bank on the 24th day of March and ask for a loan in

that statement they would set up their book values as you have set them up here?

“A. That is a matter of opinion.

“Q. Their assets and liabilities would have been set up as in your accounting here?

“A. I am not sure how they would set it up, that is how I would set it up.

“THE REFEREE: You always make a statement to the bank and the bank cuts it about half.

“MR. RHUE: Still, Your Honor, it is on the basis of the figures they submit.

“THE REFEREE: In this case, are you through?

“MR. SHORTRIDGE: I tried to get Mr. Green, the appraiser, he was unable to make it. I can get him on some other day if the Referee desires, he has examined those things.

“THE REFEREE: I am ready to rule on it. In this case there is no question in my mind at all that this company has been insolvent from the very beginning, certainly on the 25th of March. I think you creditors knew it and run an attachment on whatever there was and I would, therefore, find that the company was actually insolvent at the time your garnishment was levied. I will make a finding that it was actually insolvent on that date.” (T. R. 25-26).

To appellant it seems that all of the above testimony was admitted in clear violation of the rule laid down in *Liberty National Bank vs. Bear*, 265 U. S. 365, 44 S. Ct., 499, 68 L. Ed. 1057, wherein it is said:

“Nor does the fact that the sales of the partnership and individual properties, made some months later by the trustee, did not realize enough to pay either the debts of the partnership or the debts of the individual partners, respectively, establish the insolvency of the partners at the time the lien was obtained.”

To the same effect, see *In Re Cleveland Discount Company* (D. C., Ohio) 9 F. 2d 97, 101.

That the witness Racey was not qualified to express any opinion as to the value of the assets of the debtor corporation on March 25, 1948 seems clear from the decision of the Circuit Court of Appeals for the Third Circuit, in *Stitzer Hotel Company vs. Beyer*, 55 F. 2d 620, 622.

CONCLUSION

There may be a serious question as to the jurisdiction of the District Court to enter any order in the premises. Perhaps the controversy should have been determined in the state court, which had at least the constructive possession of the *res* under the writ of garnishment prior to and at the time of the adjudication of the debtor as a bankrupt. This thought seems to underlie the decision in *W. F. Pigg & Son vs. U. S.* (C. C. A. 10) 81 F. 2d 334.

Of course, it is true that in Arizona the funds sequestered by the writ of garnishment are, from the very moment of the service of the writ, in the control of the court that issued the writ. *Gillespie Land & Irrigation Company vs. Jones*, 63 Ariz. 535, 164 P. 2d 456.

Because of the stipulation of the parties, however (T. R. 33) “ . . . that the issue as to whether the now bankrupt was insolvent at the time the writ of garnishment was granted, should be resolved by the Referee in Bankruptcy”, appellant is probably precluded from challenging the jurisdiction of the District Court upon the ground indicated.

It is, however, most respectfully insisted that there is no basis in the evidence for the order of the Referee

or its affirmance by the District Judge, and that the same should be reversed.

Respectfully submitted,

KRAMER, MORRISON, ROCHE & PERRY,

R. WM. KRAMER,

J. E. MORRISON,

WALTER ROCHE,

ALLAN K. PERRY,

L. V. RHUE,

309 First National Bank Building,

Phoenix, Arizona.

Attorneys for Appellant.

No. 12194

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MABEL E. WEST,

Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

TRANSCRIPT OF RECORD

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

APR 14 1949

PAUL P. O'BRIEN,

CLERK

No. 12194

IN THE

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MABEL E. WEST,

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California
Central Division
No. 8207-Y.

MABEL E. WEST,

Plaintiff,

v.

W. E. CONRAD and HOWARD F. CONRAD,
Defendants.

FIRST AMENDED COMPLAINT AS A MATTER
OF COURSE FOR DAMAGES UNDER THE
FEDERAL PRICE CONTROL ACTS, AND FOR
ATTORNEYS' FEES AND COSTS

To the Honorable, the Judges of said District Court:

Comes now the plaintiff, Mabel E. West, and files this her amended complaint as a matter of course, and for cause of action against the defendants, alleges as follows:

I.

That plaintiff brings this action in pursuance of the provisions of Section 205 of the Housing and Rent Act of 1947, which specifically confers jurisdiction upon this court to hear and determine the matter.

II.

That at all times herein mentioned the plaintiff and the defendants were, and that they are now, residents of the County of Los Angeles, in said Central Division of the Southern District of California. [10]

III.

That plaintiff is informed and believes, and upon such information and belief alleges the fact to be that the de-

defendants W. E. Conrad and Howard F. Conrad are respectively father and son, and plaintiff alleges that the written lease hereinafter referred to and a copy of which is hereunto attached marked "Exhibit A", was executed by defendant W. E. Conrad as lessor; that all negotiations and payments had and made by plaintiff were respectively with and to said defendant W. E. Conrad; that the record title to the real property described in said lease was prior to the execution of said lease transferred by said defendant W. E. Conrad to the defendant Howard F. Conrad; that plaintiff at this time is unable to state whether said defendant W. E. Conrad in the acts herein complained of was acting as the agent of the defendant Howard F. Conrad, the holder of the record title to said real property as undisclosed principal, or whether said defendant W. E. Conrad was, in the acts herein complained of, acting on his own behalf as the real owner of said real property or otherwise; that by reason of the aforesaid, plaintiff is in some doubt as to whether she is entitled to recover from defendant W. E. Conrad or from defendant Howard F. Conrad or from both of said defendants; that said defendants have been joined herein for the purpose and with the intent that the question as to which of said defendants is, or whether both defendants are liable to plaintiff may be determined in this action, and that the court may award judgment to plaintiff against said defendants either jointly, severally or in the alternative as to the court may seem proper.

IV.

That on or about the 4th day of March, 1947, the defendant W. E. Conrad as lessor, and the plaintiff, as lessee, entered into a certain written lease of that certain dwelling [11] house situated at 7462 Hollywood Boulevard in the City of Los Angeles in said County for the

term of two (2) years commencing on the 15th day of March, 1947 and ending on the 14th day of March, 1949, at the total rent or sum of eight thousand four hundred dollars (\$8,400.00) payable monthly in advance on the 15th day of each and every calendar month of said term in equal monthly installments of three hundred and fifty dollars (\$350.00), under which lease it was further provided that the lessee should deposit an additional sum of three hundred and fifty dollars (\$350.00) to cover the last month of the term of said lease; that a copy of said lease is hereunto attached, marked "Exhibit A" and made a part hereof as if herein fully set forth and alleged; that at the time of making said lease plaintiff was wholly unaware that a maximum legal rent for said dwelling house had been established as hereinafter set forth.

V.

That plaintiff entered into possession of said dwelling house on or about the 15th day of March, 1947, and from thence hitherto has been in possession thereof; that prior to entering into possession of said dwelling house, plaintiff paid to defendant W. E. Conrad the sum of seven hundred dollars (\$700.00), being the rental of said dwelling house for the first and last months of the term of said lease, and that on or about the 15th day of each and every month following the 15th day of March, 1947, to and including the 15th day of April, 1948, plaintiff has paid defendant W. E. Conrad the sum of three hundred and fifty dollars (\$350.00), such payments being in each case payment in advance of the monthly rental prescribed by said lease.

VI.

That under the provisions of the Emergency Price Control Act of 1942 and of said Act as amended, the

maximum [12] rent established for said dwelling house was the sum of seventy-five dollars (\$75.00) per month, and that, from the first day of May, 1942 to the date of the verification of this amended complaint, the said sum of seventy-five dollars (\$75.00) has been the maximum or "ceiling" rent of said dwelling house. .

VII.

That defendant W. E. Conrad has demanded, accepted and received payment of rent in excess of the maximum rent prescribed under the authority of the Emergency Price Control Act of 1942 and of said Act as amended, and as prescribed under the authority of the Housing and Rent Act of 1947, to the extent of two hundred and seventy-five (\$275.00) per month in excess of the prescribed maximum rent for fourteen (14) months last past, and for the last month of the term of said lease; that plaintiff has paid to defendant W. E. Conrad the sum of three thousand three hundred dollars (\$3,300.00) in excess of such prescribed maximum rent within one year last past, and eight hundred and twenty-five dollars (\$825.00) in excess of such prescribed rent for the first, second and last months of the term of said lease.

VIII.

That under the provisions of said acts, plaintiff is entitled to recover of and from said defendants her reasonable attorneys' fees and costs as may be determined by the court, plus liquidated damages in the amount of three times the amount by which the payments made by plaintiff to defendants within one year last past have exceeded

the maximum rent which defendant could lawfully demand, accept or receive.

IX.

That defendants are indebted to plaintiff in the sum of nine thousand nine hundred dollars (\$9,900.00) for liquidated damages for rent paid in excess of the prescribed [13] maximum rent as aforesaid within one year last past, together with the reasonable fees of plaintiff's attorneys and cost as may be determined by this Honorable Court.

X.

That plaintiff has been compelled to employ attorneys to represent her in this action, and to that end has employed Messrs. George W. Manierre and Paul G. Breckenridge, attorneys at law in good standing in the State Bar of California, and duly admitted to practice before this Honorable Court, and has incurred a liability to them for their reasonable fees as such attorneys.

Wherefore plaintiff prays judgment against said defendants (1) for the sum of nine thousand nine hundred dollars (\$9,900.00) as liquidated damages; (2) for such sum as may be determined by this Honorable Court as and for her reasonable attorneys' fees; (3) for her costs of suit; and (4) for such other and further relief as may seem to the court to be proper.

GEORGE W. MANIERRE and
PAUL G. BRECKENRIDGE

By G. W. Manierre

Attorneys for Plaintiff [14]

EXHIBIT "A"

HOUSE LEASE

This Indenture, made the 4 day of March, 1947 Between W. E. Conrad, Lessor (whether one or more); And Mabel E. West, Lessee (whether one or more); Witnesseth: That for and in consideration of the payment of the rents, and the performance of the covenants contained herein, on the part of the said Lessee, and in the manner hereinafter specified, said Lessor does hereby lease, demise and let, unto the said Lessee, that certain Studio dwelling house and its appurtenances situated at 7462 Hollywood Blvd To be used as a Guest Home, or any other lawful purpose, conforming with laws, ordinances, regulations or rules of any public authorities Lessee to carry Public Liability Insurance insuring Lessor against any and all liability for injuries to persons in or about said premises Lessee shall have the right to sublet any portion of the demised premises Lessee shall not have the right to sell or assign this lease with out the written consent of Lessor. Lessee shall pay all gas and electricity Lessee shall take care of all minor repairs. for the term of Two Years, commencing on the 15 day of March, 1947, and ending on the 14 day of March, 1949, at the total rent or sum of Eight Thousand Four Hundred (\$8400.00) --- Dollars, payable monthly in advance on the 15 day of each and every calendar month of said term in equal monthly payments of Three Hundred Fifty --- (\$350.00) --- Dollars, The first monthly rental of \$350.00 payable March 6, 1947 at time of signing lease, as an additional

consideration for the execution of this lease by the Lessor, the Lessee shall deposit an additional sum of \$350.00 and the Lessor agrees that if at the terms of this lease, and if the Lessee shall pay all of the rentals provided under the within lease, when said rent becomes due, during said period, have truly observed, performed and abided by each and all of the covenants, in such event the Lessor agrees that the Lessee may enjoy the use of the demised premises from Feb. 15, 1949 to March 15, 1949 without payment of rent therefor. Two car garage and play house adjoining same to be included in said lease Lessee [15] hereby agrees and states that she has personally examined the demised premises and accepts said premises in the present condition, all improvements shall be at the sole expense of the Lessee.

And the said Lessee does hereby promise and agree to pay to the said Lessor the said rent, herein reserved in the manner herein specified. And ~~not to let or sublet the whole or any part of said premises~~, nor to assign this lease, and not to make or suffer any alteration to be made therein without the written consent of the said Lessor. And it is further agreed, that the said Lessor shall not be called upon to make any improvements or repairs whatsoever upon the said premises, or any part thereof, but the said Lessee agrees to keep the same in good order and condition at her own expense.

Lessor to take care of Lawn and shrubs.

Lessee to take care of own garbage, tin cans and burning papers, etc.

And it is agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said Lessor to re-enter the said premises and to remove all persons therefrom.

And That at the expiration of the said term or any sooner determination of this lease the said Lessee will quit and surrender the premises hereby demised, in as good order and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And if the Lessee shall hold over the said term with the consent, expressed or implied, of the Lessor, such holding shall be construed to be a tenancy only from month to month, and said Lessee will pay the rent as above stated for such term as she hold.... the same. Lessor agrees to pay the water rate during the continuance of this lease. If the water should run in excess of \$6.00 per month said Lessee to pay all over and above said amount.

In Witness Whereof: the said parties have hereunto set their hands and seals the day and year first above written.

W. E. CONRAD

MABEL E. WEST [16]

[Verified.]

[Endorsed]: Filed May 26, 1948. Edmund L. Smith, Clerk. [17]

[Title of District Court and Cause]

ANSWER TO FIRST AMENDED COMPLAINT

To the Honorable, the Judges of the said District Court:

Come now the defendants, W. E. Conrad and Howard F. Conrad, and file this, their Answer to the First Amended Complaint herein on file, and in so doing admit, deny and allege as follows:

I.

Answering Paragraph I of the First Amended Complaint herein on file, defendants deny generally and specifically that Section 205 of the Housing and Rent Act of 1947 specifically, or in any other manner, confers jurisdiction upon this Court to hear and determine this matter, and in this connection the defendants allege that the subject matter of this action, more particularly, the issue of damage under the aforementioned Federal legislation, is not within the jurisdiction of this Honorable Court, the subject premises having been by the defendant, W. E. Conrad, let and demised to the plaintiff herein for purposes exempt and not contained within the scope of the aforementioned Federal regulation, [18] nor any other Federal regulations.

II.

Answering Paragraph II of the First Amended Complaint herein on file, defendants deny generally and specifically that they are father and son respectively, and further deny that the defendant, W. E. Conrad, was at any time herein mentioned the acting agent of the defendant, Howard F. Conrad, and further deny that the defendant,

Howard F. Conrad, was the principal of the defendant, W. E. Conrad, either as the disclosed or undisclosed principal, and further deny that either of the defendants is liable to the plaintiff herein in any manner whatsoever, either jointly, severally or in the alternative.

III.

Answering Paragraph IV of the First Amended Complaint herein on file, defendants deny generally and specifically that at the time of the making of the lease therein referred to the plaintiff was unaware either wholly or partially that a maximum legal rent had been established in and to the premises located at 7462 Hollywood Blvd., but in this connection, the defendants do affirmatively allege that plaintiff was at all times aware that a maximum legal rent had been determined in and to said premises in so far only, however, that said premises were to be used and occupied for dwelling purposes and as a dwelling house; the defendants, in this connection, further allege that at all times mentioned in said complaint said premises were leased and demised to the plaintiff for business purposes, and the plaintiff did at all times therein mentioned occupy and use said premises for business purposes, and that but for plaintiff's promise and representation that said premises would be used for business purposes, said premises would not have unto her been let or demised, and at all times therein mentioned, plaintiff represented to the defendants that said premises would by her be used for business purposes, and [19] that said representations, as hereinbefore mentioned, were relied upon by the defendants, and that but for said representations and promises, as aforesaid, by plaintiff, defendants would not have permitted the occupancy of the premises by the plaintiff, nor would defendants have entered into the aforementioned lease agreement with the plaintiff.

IV.

Answering Paragraph V of the First Amended Complaint herein on file, defendants deny each and every allegation therein contained both generally and specifically and more particularly deny that the sums of money alleged therein to have been paid by the plaintiff to the defendant, W. E. Conrad, were paid as rental for a dwelling house, but rather allege that all sums of money paid by the plaintiff to the defendant, W. E. Conrad, were paid for plaintiff's occupancy of the subject premises for business purposes, it at all times therein mentioned having been represented by the plaintiff that said property would by her be used for business purposes and that said premises were not to be by her used as a dwelling house.

V.

Answering Paragraph VI of the First Amended Complaint herein on file, defendants deny each and every allegation therein contained both generally and specifically.

VI.

Answering Paragraph VII of the First Amended Complaint herein on file, defendants deny generally and specifically each and every allegation therein contained and more particularly deny that the plaintiff has paid to the defendant, W. E. Conrad, and that the defendant, W. E. Conrad, has received \$275.00 per month, or any other sum, in excess of the prescribed rent for the subject premises, either for fourteen months, or for any other period, and further deny that the plaintiff has paid to the defendant, [20] W. E. Conrad, or that the defendant, W. E. Conrad, has received the sum of \$3,300.00, or any other sum, in excess of the maximum rent of the subject premises, and further deny that the plaintiff has paid to

the defendant, W. E. Conrad, or that the defendant, W. E. Conrad, has received the sum of \$825.00 in excess of said prescribed rent, either for the first, second and last month's rent, or for any other term or months, and further deny that there is any maximum rent governing the subject premises under any governmental regulations whatsoever whether they be Federal or State.

VII.

Answering Paragraph VIII of the First Amended Complaint herein on file, defendants deny generally and specifically each and every allegation therein contained.

VIII.

Answering Paragraph IX of the First Amended Complaint herein on file, defendants deny each and every allegation therein contained both generally and specifically, and in this connection, the defendants allege that they are not indebted to the plaintiff in the sum of \$9,900.00, or any other sum whether as liquidated or other damage.

For a First, Separate and Distinct affirmative defense to the First Amended Complaint herein on file, defendants allege as follows:

I.

That at all times mentioned in said First Amended Complaint, the defendant, W. E. Conrad, leased unto the plaintiff the subject premises for business purposes only; that the defendant, W. E. Conrad, was informed and believed, and still believes, that the subject premises being situated within an area within the city of Los Angeles designated by the zoning officials of said municipality [21] as a permissible area and zoned for the conducting therein of certain businesses and which zoning regulations promulgated as hereinbefore mentioned have been ap-

proved by the City Council of said municipality, could be legally and legitimately leased for the purpose of conducting therein the permissible businesses therein, as hereinbefore mentioned.

II.

That at a time prior to the 5th day of March, 1947, the plaintiff herein did request of the defendant, W. E. Conrad, that she be permitted to lease and occupy the subject premises for the purpose of conducting therein a business, more particularly, a sanitarium and convalescent home for ill and infirm persons; that said plaintiff there and then did state to the said defendant that she would conduct and operate therein the aforementioned business and that she would do so in conjunction with the operation of another and different sanitarium also by her operated.

III.

That the said defendant, in reliance upon said representations by the plaintiff, and in good faith, entered into a written agreement with the said plaintiff thereby letting and demising unto her the said premises; that said plaintiff offered and the said defendant assented to plaintiff's offer of \$350.00 per month as rent; that at all times herein mentioned the said defendant believed, and still believes that the plaintiff has at all times conducted a business, as aforesaid, within said premises.

For a Second, Separate and Distinct affirmative defense to the complaint herein on file, the defendants allege as follows:

I.

That at all times herein mentioned, the plaintiff did unlawfully, maliciously, knowingly and fraudulently represent and state to the defendant, W. E. Conrad, that she would occupy, [22] maintain, conduct and operate within

the subject premises, a business; that said representations by the plaintiff made to the said defendant, at all times herein mentioned, were made with the intent and purpose of making the said defendant rely thereupon and that said defendant did rely thereupon in good faith, and that pursuant to said reliance and good faith, and in confidence upon the aforesaid statements and representations by the plaintiff made, did lease and demise to said plaintiff the subject premises.

II.

That said representations were knowingly made by the plaintiff to the said defendant with the deliberate and conceived intent that she would be enabled thereby at a later date to bring before this Honorable Court the present proceedings and thereby unjustly, illegally and unlawfully procure a judgment herein for damages for the alleged violation, as hereinbefore in the First Amended Complaint herein on file set forth, and that but for the aforementioned representations by the plaintiff made to the said defendant the defendants would not have entered into the aforementioned lease with the plaintiff nor have accepted from the plaintiff rent in any amount.

Wherefore, the defendants, W. E. Conrad and Howard F. Conrad, pray that plaintiff take nothing by reason of her complaint (First Amended Complaint) and that the defendants be hence dismissed with their costs.

LEONARD WILSON and
ARNOLD L. LEADER

By Arnold L. Leader

Attorneys for Defendants [23]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 18, 1948. Edmund L. Smith,
Clerk. [24]

[PLAINTIFF'S EXHIBIT NO. 1]

HOUSE LEASE

This Indenture, made the 4 day of March, 1947 Between W. E. Conrad, Lessor (whether one or more); And Mabel E. West, Lessee (whether one or more);

Witness: That for and in consideration of the payment of the rents, and the performance of the covenants contained herein, on the part of the said Lessee, and in the manner hereinafter specified, said Lessor does hereby lease, demise and let, unto the said Lessee, that certain Studio dwelling house and its appurtenances situated at 7462 Holly Blvd To be used as a Guest House, or any other lawful purpose, conforming with laws, ordinances, regulations or rules of any public authorities Lessee to carry Public Liability Insurance insuring Lessor against any and all liability for injuries to persons in or about said premises Lessee shall have the right to sublet any portion of the demised premise Lessee shall not have the right to sell or assign this lease with out the written consent of Lessor. Lessee shall pay all gas and electricity Lessee shall take care of all minor repairs. for the term of Two Years, commencing on the 15 day of March, 1947, and ending on the 14 day of March, 1949, at the total rent or sum of Eight Thousand Four Hundred (8400.00) --- Dollars, payable monthly in advance on the 15 day of each and every calendar month of said term in equal monthly payments of Three Hundred Fifty --- (\$350.00) --- Dollars, The first monthly rental of \$350.00 payable March 6, 1947 at time of signing lease, as an additional consideration for the execution of this lease by the Lessor, the Lessee shall deposit an additional sum of \$350.00 and the Lessor agrees that if the terms of this lease, and if the Lessee shall pay all of the rentals

provided under the within lease, when said rent becomes due, during said period, have truly observed, performed and abided by each and all of the covenants, in such event the Lessor agrees that the Lessee may enjoy the use of the demised premises from Feb. 15, 1949 to March 15, 1949 without payment of rent therefor.

Two car garage and play house adjoining same to be included in said lease.

Lessee hereby agrees and states that she has personally examined the demised premises and accepts said premises in the present condition, all improvements shall be at the sole expense of the Lessee.

And the said Lessee does hereby promise and agree to pay to the said Lessor the said rent, herein reserved in the manner herein specified.

And not to let or sublet the whole

~~And not to let or sublet the whole or any part of said premises,~~ nor to assign this lease, and not to make or suffer any alteration to be made therein without the written consent of the said Lessor. And it is further agreed, that the said Lessor shall not be called upon to make any improvements or repairs whatsoever upon the said premises, or any part thereof, but the said Lessee agrees to keep the same in good order and condition at her own expense.

Lessor to take care of Lawn and shrubs.

Lessee to take care of own garbage, tin cans and burning papers etc.

And it is agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said Lessor to re-enter the said premises and to remove all persons therefrom. [25]

And that at the expiration of the said term or any sooner determination of this lease the said Lessee will quit and surrender the premises hereby demised, in as good order and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And if the Lessee shall hold over the said term with the consent, expressed or implied, of the Lessor, such holding shall be construed to be a tenancy only from month to month, and said Lessee will pay the rent as above stated for such term as she hold.... the same. Lessor agrees to pay the water rate during the continuance of this lease. If the water should run in excess of \$6.00 per month said Lessee to pay all over and above said amount.

In Witness Whereof: the said parties have hereunto set their hands and seals the day and year first above written.

W. E. Conrad
Mabel E. West

No..... House Lease W. E. Conrad Lessor to
Mabel E. West Lessee Dated March 15, 1947

Case No. 8207-Y. Mabel E. West vs. W. E. Conrad et al. Plf. Exhibit 1. Date Oct. 12, 1948. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist of Calif. John A. Childress, Deputy Clerk. [25A]

[PLAINTIFF'S EXHIBIT NO. 2]

Copy

Form DD-U

This is a copy of the Registration in Area Files.

Landlord's Copy

UNITED STATES OF AMERICA
OFFICE OF TEMPORARY CONTROLS
OFFICE OF PRICE ADMINISTRATION
Registration of Rental Dwellings

(Type or Print Plainly—Do Not Fold)

(Do Not Use This Form for Hotels and Rooming Houses)

GENERAL INSTRUCTIONS

The landlord is required to register separately each rental dwelling unit, whether occupied or vacant. A dwelling unit is a room or a group of rooms for which a single rent is paid. Complete this Registration Statement in triplicate. (If not typewritten, be sure sufficient pressure is used so that both carbon copies are clear and distinct.) Remove carbons, and mail or bring the three copies to the Area Rent Office. Use extra sheets, in triplicate, for sections "D" & "E" if necessary.

Maximum Rent Date 3-1-42 Effective Date 11-1-42

IDENTIFICATION

1. Mary LeGrange 7462 Hollywood Blvd.
Address of this rental dwelling unit
2.
Apartment number or location
3. Number of Rooms in unit being registered eight
4. Total Number of dwelling units in this structure two

Section A. Mailing Address of Landlord

1. Name of Landlord H. F. Conrad

2. Name of Agent W. E. Conrad

3. Address Mail to:

Name W. E. Conrad

Address 7464 Hollywood Blvd.

City and State Los Angeles, California

Section B. Mailing Address of Tenant

Name of Tenant Mary LeGrange

Address 7462 Hollywood Blvd.

City and State Los Angeles, California

Section C. Maximum Rent

Read carefully and fill in every item which applies to this dwelling unit.

1. Rent on "Maximum Rent date" \$75.00 per week ()
per month (x)

* * * * *

7. The Maximum Rent For This Dwelling Unit Is:

→ \$75.00 per week () per month (x)

* * * * *

Section D. Equipment and Services

(Check the equipment and services included in the rent on "Maximum Rent date" or the most recent date you entered in Section C.) (Answer "Yes" or "No".)

1. Equipment	Yes	No	2. Services	Yes	No
Furniture	[]	[x]	Garage	[x]	[]
Running Water	[x]	[]	Heat or Heating		
Hot Water	[x]	[]	Fuel	[]	[x]
Flush Toilet	[x]	[]	Cooking Fuel	[]	[x]
Bathroom	[x]	[]	Cold Water	[x]	[]
Central Heating	[x]	[]	Hot Water	[]	[x]
Heating Stove	[]	[x]	Light	[]	[x]
Mech. Refrigerator	[x]	[]	Ice or Refrigeration	[]	[x]
Electricity In-			Janitor Service	[]	[x]
stalled	[x]	[]	Garbage Disposal	[]	[x]
Cooking Stove	[]	[x]	Painting & Decorat-		
If any equipment is shared,			ing	[]	[x]
explain below:			Interior Repairs	[]	[x]
.....			Exterior Repairs	[]	[x]
.....			List any other services:		
.....			I paint, repair and decorate		
			at my discretion to conserve		
			prop.		

Are all equipment and services indicated above now included in the rent? Yes (x) No ()

If "No" you must also file Form D-2.

* * * * *

WARNING

The rent for this dwelling unit on and after the "effective date" can be no more than the Maximum Rent entered in Section C, Item 7, unless changed by order of the Rent Director (see Section C, Item 8).

A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.

I Hereby Represent that all statements and entries given hereon are true and correct.

(Signed) W. E. Conrad

(Signature of Landlord or his Agent) (Date) [26]

I Certify That This Is a True and Correct Copy of the Registration in the Files of the Area Rent Control Office, Los Angeles, Calif.

Clara E. Hackle

Registration Supervisor Title

10/6/48

* * * * *

Case No. 8207 Y. West vs. Conrad. Plf. Exhibit 2.
Date 10/12/48 No. 2 in Evidence. Clerk, U. S. District
Court, Sou. Dist. of Calif. Louis J. Somers, Deputy
Clerk. [27]

[PLAINTIFF'S EXHIBIT NO. 3]

GEORGE W. MANIERRE and

PAUL G. BRECKENRIDGE

Attorneys for Plaintiff

307 West Eighth St., Suite 814,

Los Angeles 14 TRinity 7917

In the District Court of the United States, Southern
District of California, Central Division.

Mabel E. West, Plaintiff, v. W. E. Conrad and Howard
F. Conrad, Defendants. No. 8207-Y

REQUEST FOR ADMISSIONS.

To the defendants W. E. Conrad and Howard F. Conrad,
and to Leonard Wilson and Arnold L. Leader, Esqs.,
their attorneys:

The plaintiff Mabel E. West requests the defendants
W. E. Conrad and Howard F. Conrad and each of them
to admit the truth of the matters of fact set forth herein,
and to make the following admissions for the purpose of
this action only and subject to all pertinent objections to
admissibility which may be interposed at the trial.

(1) That prior to the 4th day of March, 1947, Defendant W. E. Conrad registered as a rental dwelling under the provisions of the Emergency Price Control Act of 1942 and of said Act as amended, the real property described in the lease, a copy of which is attached to plaintiff's first amended complaint and marked "Exhibit A".

(2) That said real property is and ever since said [28] registration has been registered under the provisions of the Emergency Price Control Act of 1942 and of said Act as amended and under the Housing and Rent Act of 1947 for a maximum or "ceiling" rent of seventy-five dollars (\$75.00) per month.

(3) That said real property is registered under said act as housing accomodations.

(4) That defendant Howard F. Conrad never registered said real property under the provisions of the Emergency Price Control Act or of said act as amended or under the Housing and Rent Act of 1947.

(5) That no change has ever been made in the maximum or ceiling rent of seventy-five dollars (\$75.00) per month for said real property.

(6) That said real property has always been used as housing accomodations.

(7) That said real property consists of one-half of a two-story duplex dwelling house with garage.

(8) That the other half of said duplex is occupied for residential purposes.

(9) That defendant W. E. Conrad prepared or caused to be prepared the written lease of said real property, a true copy of which lease is attached to plaintiff's first amended complaint herein marked "Exhibit A".

(10) That defendant W. E. Conrad collected the rental payments made by plaintiff for said real property as provided in said lease.

(11) That during some time subsequent to the year 1942 and prior to the 4th day of March, 1947, the real property described in the lease, copy of which is attached to plaintiff's amended complaint herein and marked "Exhibit A" was rented to a tenant or tenants other than plaintiff [29]

(11a) That such tenant or tenants paid a rental of seventy-five dollars (\$75.00) per month for said real property.

(11b) That such tenant or tenants paid a rental not in excess of seventy-five dollars (\$75.00) per month for said real property.

(11c) That such tenant or tenants rented rooms in the dwelling house described in said lease.

(11d) That such tenant or tenants or some of them kept paying guests in said dwelling house.

(12) That since the 4th day of March, 1947, defendant W. E. Conrad has paid such real property taxes as have been paid on the real property described in said lease.

(13) That defendant Howard F. Conrad has never paid any part of the real property taxes assessed against the real property described in said lease.

(14) That defendant W. E. Conrad has never paid any portion of the income from said real property nor any rental therefor to defendant Howard F. Conrad.

(14a) That defendant W. E. Conrad has the exclusive control and management of said real property leased to plaintiff.

(14b) That defendant W. E. Conrad, since the 4th day of March, 1947, has had the exclusive control and management of said real property.

(15) That defendant W. E. Conrad is the legal owner of said real property.

(16) That defendant W. E. Conrad is the equitable owner of said real property.

(17) That defendant W. E. Conrad collected from plaintiff for the rent of the real property leased by defendant W. E. Conrad to plaintiff the following sums of money as provided by the lease, copy of which is attached to plaintiff's amended complaint herein and marked "Exhibit A", viz.: [30]

Prior to the 15th day of March, 1947, the sum of seven hundred dollars (\$700.00) for the first and last months of the term of said lease;

The sum of three hundred and fifty dollars (\$350.00) on or about the 15th day of each and every month following the 15th day of March, 1947 to and including the 15th day of April, 1948.

(18) That the maximum amount of rental for said real property for the period from the 25th day of May, 1947 to and including the 25th day of May, 1948, the date of the plaintiff's first amended complaint herein, under the maximum or "ceiling" rental as set by the Office of Price Administration or the Housing Expediter, was the sum of seventy-five dollars (\$75.00) per month or a total of nine hundred dollars (\$900.00).

Said defendants are requested to admit the truth of the matters of fact hereinabove set forth on or before Thursday, August 5, 1948. In the event a sworn statement is filed by said defendants denying any of the above requested admissions, and the truth of any such matter of fact referred to in this request is subsequently proven, plaintiff will apply to said court for an order requiring said defendants to pay her the reasonable expenses incurred in making such proof, including reasonable attorneys' fees.

Dated at Los Angeles, July 23, 1948.

GEORGE W. MANIERRE and
PAUL G. BRECKENRIDGE

By G. W. Manierre

Attorneys for Mabel E. West, Plaintiff. [31]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 24, 1948. Edmund L. Smith, Clerk.

Case No. 8207-Y. West vs. Conrad. Plf. Exhibit 3. Date 10/12/48. No. 3 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [32]

[PLAINTIFF'S EXHIBIT NO. 3]

ARNOLD L. LEADER

LEONARD WILSON

1103 Quinby Building

650 South Grand Avenue

Los Angeles 14 VAndike 9138

Attorney for: Defendants

In the District Court of the United States, Southern District of California, Central Division

Mabel E. West, Plaintiff, vs. W. E. Conrad and Howard F. Conrad, Defendants. No. 8207-Y.

REPLY TO REQUEST FOR ADMISSIONS

To the Plaintiff Mabel E. West and to Her Attorneys George W. Manierre and Paul G. Breckenridge:

Comes now defendants W. E. Conrad and Howard F. Conrad and in reply to the Request for Admissions herein on file state that the matters of fact set forth therein as contained in paragraphs (1) through (18) are not the proper subject of inquiry or admissions by a "Request for Admissions", and further that the matters of fact therein set forth are not the matters contemplated to be admitted or denied within the provisions and contents of Rule 36 of the Rules of Civil Procedure for the District Courts of the United States, and basing their objection on this ground object to the admissibility of the replies herein contained both individually as to each reply to each of the eighteen (18) matters as set forth in plaintiff's Request for Admissions and to the same in their entirety.

Replying to the alleged matters of fact, and preserving all [33] objections thereto as heretofore stated and as to all legal and proper objections defendants admit, deny and allege as follows:

(1) Replying to Item (1) the defendants admit the truth of the facts therein contained.

(2) Replying to Item (2) the defendants admit the truth of the facts therein contained, but in this connection further allege that commencing with the month of June 1946, defendants herein removed the subject property from the rental market, and that the character of the subject premises was as of said time transformed into business property, and that at all times since the month of February 1947, the subject premises have been used for business purposes exclusively, and that at all times since said month of June 1946, the subject premises were and are within an R-5 zone as set forth by the zoning officials of the City of Los Angeles and adopted by the City Council of said city.

(3) Replying to Item (3) defendants admit the truth of the matters therein contained, but incorporate into and reply the further allegations as contained in reply to paragraph (2) thereof.

(4) Replying to Item (4) defendants admit the truth of the matters therein contained.

(5) Replying to Item (5) defendants deny the truth of the matters therein set forth.

(6) Replying to Item (6) defendants deny the truth of the matters therein contained and in this connection further allege that at all times since the month of February 1947, the subject premises have been used exclusively for business purposes.

(7) Replying to Item (7) defendants admit the truth of the matters therein contained.

(8) Replying to Item (8) defendants deny the truth of the matters therein contained, and in this connection allege that the other one-half of said duplex is occupied for both residential and business purposes. [34]

(9) Replying to Item (9) defendants admit the truth of the matters therein contained and in this connection further allege that prior to the preparation of the written lease therein referred to that plaintiff and defendant W. E. Conrad in detail discussed the terms and provisions thereof, and that in the preparation of said written lease the defendant W. E. Conrad incorporated therein certain of the suggestions and demands of plaintiff, and more particularly that defendant W. E. Conrad incorporated therein the demands of plaintiff that the subject premises be referred to and classified and designated as a "Guest Home".

(10) Replying to Item (10) defendants admit the truth of the matters therein contained.

(11) Replying to Item (11) defendants admit that during some time subsequent to the year 1942 and prior to the 4th day of March 1947, the premises located at 7462 Hollywood Blvd., in the City of Los Angeles was rented to a tenant or tenants other than plaintiff.

(11a) Replying to Item (11a) and incorporating defendants' reply to Item (11) defendants admit the matters therein contained.

(11b) Replying to Item (11b) defendants admit the truth of the matters therein contained.

(11c) Replying to Items (11c) and (11d) defendants state that he does not have sufficient information or belief upon which to form an opinion on the matters therein

contained and basing his reply on that ground denies the matters therein contained.

(12) Replying to Item (12) defendants deny the truth of the matters therein contained.

(13) Replying to Item (13) defendants deny the truth of the matters therein contained.

(14) Replying to Item (14), (14a) and (14b) defendants admit the truth of the matters therein contained. [35]

(15) Replying to Items (15) and (16) defendants admit the truth therein contained, and in this connection allege that although defendant W. E. Conrad is the legal and equitable owner of the subject premises, that for convenience only legal title thereto does at this time stand in the name of the defendant Howard F. Conrad.

(17) Replying to Item (17) defendants admit that the defendant W. E. Conrad received the rent as alleged therein.

(18) Replying to Item (18) defendants allege that during the period therein mentioned, the subject premises being at all times therein mentioned used for business purposes, and the Office of Price Administration having no jurisdiction to decree or otherwise determine a maximum rent therefor. Further replying to Item (18) and incorporating into said reply the matters herein set forth in replying to Item (2) of the Request for Admissions as herein on file, and basing their reply on the aforesaid allegations deny the truth of the matters therein contained.

The foregoing replies to plaintiff's Request for Admissions as herein on file are each and individually made over the prior objection of defendants as to the admissibility or irrelevancy and incompetency, and on the further objection being immaterial and on the further objection as being improper subject of inquiry under a Request for Admis-

sions, and under the further objection that said Request for Admissions must be limited into an inquiry of the genuineness of relevant documents, or of the truth of relevant matters of fact set forth in relevant documents in the manner and subject to the provisions and regulations of Rule 36 of the Rules of Civil Procedure for the District Courts of the United States. [36]

State of California, County of Los Angeles—ss.

W. E. Conrad, being by me first duly sworn, deposes and says that he is one of the defendants in the above entitled action; that he has read the foregoing Replies to plaintiff's Request for Admissions and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes same to be true.

W. E. Conrad

Subscribed and sworn to before me this 5 day of August, 1948

(Seal)

Leo Shapiro

Notary Public in and for said County and State.

Dated this 5th day of August, 1948.

ARNOLD L. LEADER and
LEONARD WILSON

By Arnold L. Leader
Attorneys for Defendants [37]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 5, 1948. Edmund L. Smith, Clerk.

Case No. 8207. West vs. Conrad. Date 10/12/48. No. 3 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [38]

[Defendants' Exhibit A]

W. E. CONRAD

7464 Hollywood Boulevard, Hollywood 46, California

Telephone HOLLYWOOD 7001

Maker of Honest Bargains

Licensed Realty Broker—Loans—Rentals

Exchanges—Insurance—Sales

REAL ESTATE

L. A. Co. Medical Journal *add*

For Sale or Lease: 7464 Hollywood Blvd. 6,500 sq. ft.
Stucco bldg., 17 rms., 6 baths. R-5 zone. Ideal for
medical group. Owner: HO 7001.

For Lease *add* similar to this ran Jan. Feb. & March
1947 In Los Angeles Times and Hollywood Citizen.

Add. in Hollywood Citizen as of Feb 3, 1947 under
business property for Lease, read, 8 Rooms suitable for
Doctors 20@ Square foot. 7464 Hollywood Blvd. Owner
Ho. 7001

Approx same *add* running Los Angeles Times 6500
Square feet all or half 20@ Square foot, as a Medical
Building.

Case No. 8207-Y Civ. West vs. Conrad. Date 10/12/48.
No. A in Evidence. Clerk, U. S. District Court, Sou. Dist.
of Calif. Louis J. Somers, Deputy Clerk. [39]

[Title of District Court and Cause]

DECISION

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the defendant that the plaintiff take nothing by her action against the defendants or either of them, and that the defendants do have judgment for and against the plaintiff for their costs herein.

Findings and Judgment to be prepared by counsel for the defendants under Local Rule 7.

Dated this 16th day of October, 1948.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Oct. 16, 1948. Edmund L. Smith, Clerk. [40]

[Title of District Court and Cause]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW PROPOSED BY
COUNSEL FOR DEFENDANTS: PROPOSED
AMENDMENTS THERETO, ADDITIONAL
FINDINGS AND MOTION TO INCORPORATE
SUCH AMENDMENTS AND ADDITIONAL
FINDINGS OF FACT AND CONCLUSIONS
OF LAW TO BE MADE HEREIN

To the Honorable Leon R. Yankwich, Judge of said Court:

Comes now Mabel E. West, the plaintiff herein, and objects to the findings of fact and conclusions of law proposed by counsel for the defendants, and moves the

Court to amend such findings of fact and conclusions of law and make additional findings to conform to the proofs and to determine material issues, all as hereinafter set forth.

I.

A. In line 14 of proposed finding III on page 2, after the word "that," insert the words: "for convenience only."

Note: See defendants' admission #15.

B. In line 15 of proposed finding III on page 2, after the words "Hollywood Boulevard," insert the words: "in the City of Los Angeles." [41]

Note: This amendment is required to locate the real property as being in the City of Los Angeles.

C. In lines 16, 17 and 18 of proposed finding III on page 2, strike out the words "that, however, the defendant W. E. Conrad is, and at all times in said complaint was, in possession of said premises and entitled thereto," and insert in lieu thereof the following: "that the defendant W. E. Conrad is and at all times mentioned in said complaint was the legal and equitable owner of said premises, and on or about March 4, 1947, was in possession thereof; that all negotiations and payments had and made by plaintiff were respectively with and to said defendant W. E. Conrad."

Note: This amendment is to make the findings harmonize with the undisputed evidence and with defendants' admissions #15 and #16.

II.

A. In line 5 of proposed finding V on page 3, after the word "lease" insert "and has remained in possession thereof up to and including the date of the commencement of this action."

B. In line 8 of said finding V, strike out the words "15th day of April" and insert the words "14th day of May."

Note: These amendments are required to conform to the proofs.

III.

After proposed finding V on page 3, insert the following additional findings:

A. That prior to the 4th day of March 1947, the defendant W. E. Conrad registered as a rental dwelling under the provisions of the Emergency Price Control Act of 1942 and of [42] said Act as amended, the real property described in said lease.

Note: This finding is required to harmonize with with the proof. See defendants' admission #1 and the certified copy of the registration statement in evidence as plaintiff's Exhibit "2".

B. That said real property is and ever since said registration has been registered under the provisions of the Emergency Price Control Act of 1942 and of said Act as amended, and under the Housing and Rent Act of 1947, for a maximum or ceiling rent of Seventy-five (\$75.00) Dollars per month.

Note: This is in strict harmony with the proof herein.

C. That said real property is registered under said Act as housing accommodations.

Note: This is in accordance with the proof. See defendants' admission #3 and plaintiff's exhibit "2" aforesaid.

D. That no change has ever been made in the maximum or ceiling rent of Seventy-five (\$75.00) Dollars per month for said real property, nor has any such change been requested or applied for.

Note: This was admitted and stipulated to upon the trial.

E. That prior to the 4th day of March, 1947, said real property was used as housing accommodations.

Note: This is supported by a preponderance of the evidence.

F. That since the 4th day of March, 1947, said real property has been used as housing accommodations.

Note: This is supported by a preponderance of the evidence. [43]

G. That said real property consists of one-half of a two-story duplex dwelling house with garage.

Note: See defendants' admission #7.

H. That the lease in question was prepared by the defendant W. E. Conrad.

Note: This is admitted.

I. That during some time subsequent to the year 1942 and prior to the 4th day of March, 1947, the real property described in said lease was rented to a tenant or tenants

other than plaintiff; that such tenant or tenants paid a rental not in excess of Seventy-five (\$75.00) -Dollars per month for said real property.

Note: See defendants' admissions #11, 11a and 11b.

J. That such tenant or tenants rented rooms in the dwelling house described in said lease.

Note: This is supported by a preponderance of the evidence and the equivocal and evasive answers of the defendant W. E. Conrad.

IV.

Strike out proposed finding VI.

Note: This is not supported by the evidence.

V.

Strike out proposed finding VII as not supported by the evidence and substitute in lieu thereof the following: "That defendant W. E. Conrad collected from plaintiff for the rent of the property leased by defendant W. E. Conrad to plaintiff the following sums of money as provided by said lease:

"Prior to the 15th day of March, 1947, the sum of seven hundred dollars (\$700.00) for the first and last months of the [44] term of said lease;

"The sum of three hundred and fifty dollars (\$350.00) on or about the 15th day of each and every month following the 15th day of March, 1947, to and including the 15th day of April, 1948."

Note: See defendants' admission #17.

VI.

Strike out proposed finding VIII as not supported by the evidence and in lieu thereof substitute the following:

A. "That under the provisions of said Acts, plaintiff is entitled to recover of and from said defendants her reasonable attorneys' fees and costs as may be determined by the Court, plus liquidated damages in the amount of three times the amount by which the payments made by plaintiff to defendants within one year prior to the commencement of this action have exceeded the maximum rent which defendants could lawfully demand, accept or receive."

B. "That defendants are indebted to plaintiff in the sum of Nine Thousand Nine Hundred (\$9,900.00) Dollars for liquidated damages for rent paid in excess of the prescribed maximum rent as aforesaid, together with the reasonable fees of plaintiffs' attorneys and costs, as may be determined by this Honorable Court."

C. "That plaintiff was compelled to employ attorneys to represent her in this action and to that end employed Messrs. George W. Manierre and Paul G. Breckenridge, and has incurred a liability to them for their reasonable fees as such attorneys."

VII.

Strike out paragraph II of the proposed conclusions of law. [45]

Note: This is an improper conclusion.

VIII.

Strike out paragraph III of the proposed conclusions of law and in lieu thereof substitute the following:

"That defendants have violated the provisions of the Emergency Price Control Act of 1942 and of said Act as amended, and the provisions of the Housing and Rent

Act of 1947 and of said Act as amended, and that the plaintiff is entitled to have and recover from the defendant W. E. Conrad the sum of Nine Thousand Nine Hundred (\$9,900.00) Dollars as liquidated damages, together with her reasonable attorneys' fees and her costs of suit."

IX.

Strike out paragraph IV of the proposed conclusions of law and in lieu thereof substitute the following:

"This matter will be set down for hearing at an early date upon motion of the plaintiff for the purpose of determining the sum to be awarded to her as and for her reasonable attorneys' fees."

Wherefore, plaintiff prays that a date be set convenient to court and counsel for hearing these objections and proposed additional findings, and motion to incorporate such amendments and additional findings in the findings of fact and conclusions of law to be made herein, and that upon such hearing these objections be sustained and the motion of plaintiff granted.

These objections and motion of the plaintiff are most respectfully submitted.

GEORGE W. MANIERRE and
PAUL G. BRECKENRIDGE

By George W. Manierre

Attorneys for Plaintiff [46]

[Affidavit of Service by Mail.]

Objections considered and overruled, except as to I(B)
October 31, 1948.

YANKWICH, J.

[Endorsed]: Filed Nov. 1, 1948. Edmund L. Smith,
Clerk. [47]

[Title of District Court and Cause]

FINDINGS OF FACT

The above entitled cause came on regularly for trial before the Honorable Leon R. Yankwich, United States District Judge presiding, on October 12, and 13, 1948, plaintiff, Mabel E. West, appearing by her attorneys, George W. Manierre and Paul G. Breckenridge, and the defendants, W. E. Conrad and Howard F. Conrad, appearing by their attorneys, Leonard Wilson and Arnold L. Leader, and evidence having been duly introduced by each of the parties, and the Court having heard the testimony, and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the written Memorandum of Decision having been rendered in favor of the defendants and against the plaintiff under date of October 16, 1948, now therefore, the Court makes the following—

Findings of Fact: [48]

I.

The jurisdiction of this Court arises under and by virtue of the provisions of Section 205 of the Housing and Rent Act of 1947, and as amended, which section of said act specifically confers jurisdiction upon this Court to hear and determine this matter.

II.

That at all times in the complaint mentioned, and in the amended complaint mentioned, the plaintiff and defendants were residents of the County of Los Angeles, and that all parties hereto are citizens of the State of California residing within this jurisdiction district.

III.

That the defendants, W. E. Conrad and Howard F. Conrad are brothers and that the record title of the [LRY J] City of Los Angeles, premises located at 7462 Hollywood Boulevard in the County of Los Angeles, stands in the name of Howard F. Conrad; that however, the defendant, W. E. Conrad is, and at all times in said complaint was, in possession of said premises and entitled thereto and that on or about March 4, 1947, said defendant, W. E. Conrad, entered into a written lease agreement of the aforementioned premises with the plaintiff herein, a copy of which lease agreement is attached to the complaint herein on file, and the original of which has heretofore been introduced into evidence by the plaintiff, and is presently before the Court.

IV.

That said written lease agreement, among other things, provides that the term of said lease be for the term of two (2) years commencing on the 15th day of March 1947 and ending on the 14th day of March 1949, at the total rent or sum of Eight Thousand Four Hundred (\$8,400.00) Dollars payable monthly in advance on the 15th day of each and every calendar month of said term in equal monthly installments of Three Hundred and Fifty (\$350.00) under which lease it was further provided that the leasee should deposit an additional sum of [49] Three Hundred and Fifty (\$350.00) Dollars to cover the last month of the term of said lease.

V.

That the plaintiff entered into possession of said dwelling house pursuant to the terms of said lease, and paid rent regularly to the defendant herein in the sum of Three Hundred and Fifty (\$350.00) Dollars per month for each

and every month up to and including the 15th day of April, 1948.

VI.

The Court finds that at the time of the making of said lease as heretofore mentioned, it was the mutual intention and contemplation of the parties that the premises were to be used by the plaintiff for business purposes, more particularly, for the purpose of plaintiffs conducting therein a rest home for ill and infirm persons or so-called patients of an ambulatory nature, and not for the purpose of plaintiff occupying said premises for housing or dwelling purposes within the scope of said term as used in the Housing and Rent Act of 1947, or said Act as amended.

VII.

The Court finds that the defendant, W. E. Conrad, has not demanded or accepted nor received payment of rent in excess of the maximum rent prescribed under the authority of the Emergency Price Control Act of 1942 and of said Act as amended, and as prescribed under the authority of the Housing and Rent Act of 1947.

The Court further finds by reason of the findings heretofore mentioned, that the plaintiff is not entitled to recover of and from said defendants, all attorneys' fees, nor her costs, and further that said plaintiff is not entitled to recover any monies whatsoever from the defendants, or either of them by reason of the alleged overcharge by the defendants, nor is she entitled to recover from the defendants liquidated damages in the amount of [50] three times the amount of said alleged overcharge as claimed by the plaintiff for the reason that, as aforesaid, said lease agreement by and between the plaintiff and defendant that the rents received thereunder were not within the

controls and limitations as contained in the Emergency Price Control Act of 1942, and of said Act as amended, nor under the authority of the Housing and Rent Act of 1947, or said Act as amended.

From the foregoing Findings of Fact, the Court makes the following—

Conclusions of Law:

I.

The Court has jurisdiction in the instant action.

II.

That it was not within the contemplation of the parties hereto that the subject premises be leased for housing purposes as such, but rather, that at all times in the complaint mentioned, it was the contemplation of the parties that the subject premises be used for purposes of conducting a business therein.

III.

That the defendants have not violated the provisions of the Emergency Price Control Act of 1942, and of said Act as amended, nor the provisions of the Housing and Rent Act of 1947, or of said Act as amended, and particularly that the defendants have not violated the provisions of Section 205 of the Housing and Rent Act of 1947, or of said Act as amended.

IV.

Plaintiff is entitled to no judgment of any nature against the defendants, and defendants are entitled to judgment for and against the plaintiff, and for their costs herein.

Let judgment be entered accordingly.

Dated this 1st day of November, 1948.

LEON R. YANKWICH

United States District Judge [51]

(Strike out two of the following:)

1. ~~Approved as to form.~~
2. ~~Disapproved as to form.~~
3. Receipt of copy of the foregoing Findings of Fact, and Conclusions of Law, acknowledged this 26th day of October, 1948, at 1:10 o'clock P. M. George W. Manierre and Paul G. Breckenridge, by G. W. Manierre, Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 1, 1948. Edmund L. Smith, Clerk. [52]

In the District Court of the United States
Southern District of California
Central Division

No. 8207-Y

MABEL E. WEST,

Plaintiff,

vs.

W. E. CONRAD and HOWARD F. CONRAD,
Defendants.

JUDGMENT FOR DEFENDANTS

This cause came on regularly for trial before the Honorable Leon R. Yankwich, United States District Judge presiding, on October 12 and 13, 1948; the plaintiff, Mabel E. West appearing by her attorneys, George W. Manierre and Paul G. Breckenridge, and the defendants, W. E. Conrad and Howard F. Conrad appearing by their attorneys, Leonard Wilson and Arnold L. Leader, and evi-

dence having been duly introduced by each of the parties and argued, and the cause having been submitted to the Court for decision and judgment herein, and findings of fact and conclusions of law having been made and signed and filed by the Court herein and good cause appearing therefore,

It Is Hereby Ordered Adjudged and Decreed that plaintiff, Mabel E. West, take nothing by reason of her complaint herein and that judgment on the merits be and it is hereby rendered in favor of the defendants, W. E. Conrad and Howard F. Conrad, and that the defendants recover their costs herein.

Dated this 1st day of November, 1948. [53]

LEON R. YANKWICH

United States District Judge

(Strike out two of the following:)

1. ~~Approved as to form;~~
2. ~~Disapproved as to form;~~
3. Receipt of copy of the foregoing Judgment for Defendants acknowledged this 1st day of November, 1948 at 3:45 P. M. George W. Manierre and Paul G. Breckenridge, by Paul G. Breckenridge, Attorneys for Plaintiff.

Judgment entered Nov. 2, 1948. Docketed Nov. 2, 1948. Book 53, page 644. Edmund L. Smith, Clerk, by C. A. Simmons, Deputy.

[Endorsed]: Filed Nov. 1, 1948. Edmund L. Smith, Clerk. [54]

[Title of District Court and Cause]

NOTICE OF APPEAL TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT

Notice Is Hereby Given that plaintiff, Mabel E. West, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 2, 1948.

Dated at Los Angeles November 29, 1948.

GEORGE W. MANIERRE and
PAUL G. BRECKENRIDGE
Attorneys for Appellant Mabel E. West
By George W. Manierre

[Endorsed]: Mld. copy to Leonard Wilson & Arnold L. Leader, 650 S. Grand Ave., L. A. 14. Filed Nov. 30, 1948. Edmund L. Smith, Clerk. [55]

[Title of District Court and Cause]

PETITION FOR ORDER EXTENDING TIME FOR
FILING RECORD AND DOCKETING APPEAL

To the Hon. Leon R. Yankwich, Judge of said court:

Your petitioner, George W. Manierre, respectfully represents that he is one of the attorneys for the plaintiff herein; that on November 30, 1948 he filed with the Clerk of this Court a notice of appeal by the plaintiff to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 2, 1948, and, on the same date, filed with the Clerk

of this Court a designation of the contents of record on appeal in which the Clerk was requested to prepare a transcript, including the complete record and all the proceedings and evidence in the action; that shortly thereafter your petitioner ordered Mr. H. A. Dewing, the Court Reporter assigned to your Honor's courtroom, to prepare a [58] stenographic transcript of the evidence heard upon the trial of said action to be included in the record on appeal; that your petitioner is now informed by said H. A. Dewing that the condition of his health and the calls upon his time have been such that he has not been able to prepare such transcript, and that he probably will not be able to do so before the latter part of January, 1949;

That your petitioner and his associate, Paul G. Breckenridge, Esq., have acted promptly in this matter and have in no wise contributed to delay in preparing the record on appeal herein.

Wherefore, your petitioner, acting for and on behalf of said Mabel E. West, the plaintiff and appellant herein, prays that an order may be entered herein ex parte and without notice extending the time for filing the record on appeal and docketing the appeal in said the United States Court of Appeals for the Ninth Circuit for a period of ninety (90) days from November 30, 1948, the date of filing the first notice of appeal, that is to say, to and including the 28th day of February, 1949.

All of which is respectfully submitted.

GEORGE W. MANIERRE

Petitioner [59]

[Verified.]

[Endorsed]: Filed Jan. 5, 1949. Edmund L. Smith,
Clerk. [60]

[Title of District Court and Cause]

ORDER EXTENDING TIME FOR FILING AND
DOCKETING APPEAL

This matter having come on to be heard upon the verified petition of George W. Manierre, one of the attorneys for the plaintiff herein, and the court having examined said petition, and good cause appearing therefor,

It Is Ordered that the time within which the plaintiff may file the record on her appeal in the United States Court of Appeals for the Ninth Circuit and have the same docketed there be, and the same is hereby extended for the period of ninety (90) days from the 30th day of November, 1948; that is to say, until the 28th day of February, 1949.

Dated: January 5, 1949.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Jan. 5, 1949. Edmund L. Smith,
Clerk. [61]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 61, inclusive, contain the original Complaint for Damages Under the Federal Price Control Acts, and for Attorneys' Fees and Costs; First Amended Complaint as a Matter of Course, for Damages Under the Federal Price Control Acts, and for Attorneys' Fees and Costs; Answer to First Amended Complaint; Plaintiff's 1, 2, 3 (Request for Admissions), (Reply to Request for Admissions); Defendants' Exhibit A; Decision; Objections to Findings of Fact and Conclusions of Law Proposed by Counsel for Defendants, Proposed Amendments Thereto, Additional Findings and Motion to Incorporate Such Amendments and Additional Findings in the Findings of Fact and Conclusions of Law to Be Made Herein; Findings of Fact and Conclusions of Law; Judgment for Defendants; Notice of Appeal; Designation of Contents of Record on Appeal; Petition for Order Extending Time for Filing Record and Docketing Appeal and Order Extending Time for Filing and Docketing Appeal which, together with Reporter's Transcript of Proceedings on October 12 and 13, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24th day of February, A. D. 1949.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 12, 1948

Appearances:

For the Plaintiff: George W. Manierre, Esq., and Paul G. Breckenridge, Esq., Suite 814, 307 West Eighth Street, Los Angeles, California.

For the Defendants: Leonard Wilson, Esq., and Arnold L. Leader, Esq., 650 South Grand Avenue, Los Angeles, California.

Los Angeles, California; October 12, 1948;
10:00 O'Clock A. M.

MABEL E. WEST,

the plaintiff, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

A. Mabel E. West.

Mr. Breckenridge: Q. Mrs. West, I hand you here an instrument entitled House Lease, purporting to have been made the 4th day of March, 1947.

Mr. Wilson: This lease is admitted both by the pleadings and our stipulation.

Mr. Breckenridge: The lease is admitted, but I want to put a copy in.

Mr. Wilson: I don't care to make a formal objection.

The Court: If counsel has a lease I think it will be well to put it in.

(Testimony of Mabel E. West)

Q. By Mr. Breckenridge: I will ask you if this signature which appears on that is your signature.

A. Yes.

Q. And the signature of W. E. Conrad is the signature of W. E. Conrad? A. Yes.

Mr. Breckenridge: I would like to have this introduced.

The Court: It may be received. [3*]

The Clerk. Plaintiff's Exhibit 1 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 1 and received in evidence.)

Q. By Mr. Breckenridge: Mrs. West, will you describe briefly these premises to the court; I mean the nature of the structure, and the rooms and location.

A. The place has a living room, a dining room, a kitchen, 3 bedrooms and a breakfast nook, and 2 bathrooms, on the first floor; and a bedroom and two bathrooms on the second floor.

Q. Where is it located?

A. 7462 Hollywood Boulevard.

Q. That is between La Brea and—

A. It is the second house from the corner of Gardner and Hollywood Boulevard.

Q. What type of building is that?

A. A double house, a duplex I guess you would call it.

Q. Is it a house made up of a single house, or a double house? A. It is a double.

Q. Who lives in the other half, is one of these leased at present? A. Mr. Conrad.

Q. Who lives with him, do you know?

A. Only his family that I know of. [4]

(Testimony of Mabel E. West)

Q. Is this property close to the street or set back?

A. There is a 15 or 20 foot yard frontage.

Q. Were there any signs or advertising matter that you had in this building at any time during your occupancy?

A. No, sir.

The Court: Did you say this was a duplex?

A. Yes, sir.

The Court: An upper and lower, or side by side?

A. Side by side.

The Court: I am trying to visualize the place. Is that not the portion of the street where the land is rather high from the street level?

A. No. This was on the sidewalk level.

The Court: This used to be called Gardner Junction?

A. Yes.

Mr. Breckenridge: Gardner Junction is on Santa Monica where the streetcar crosses.

The Court: Yes.

Mr. Breckenridge: Your Honor is familiar with the Christian Science Church on the corner of La Brea?

The Court: Yes. That is where Hollywood Boulevard becomes narrow.

Mr. Breckenridge: Yes. There are no streetcars on it.

The Court: I know.

Q. By Mr. Breckenridge: Mrs. West, are you familiar [5] with the location between La Brea and Rubio and Hollywood Boulevard?

A. I am.

Q. Do you know of any store buildings, commercial buildings, or office buildings, in any of that section between La Brea and Hollywood Boulevard?

A. There are none within a mile.

(Testimony of Mabel E. West)

Q. Did you yourself occupy these premises?

A. I did.

Q. This property there? A. I did.

Q. Did anybody else occupy those premises during the time you took possession of the property to the present time? A. Yes.

Q. Who was occupying the premises with you up to the time this suit was filed in the month of May, 1948? Who was living there besides yourself?

A. Well, there were three roomers.

Q. Three roomers? A. That's right.

Q. What services, if any, did they receive from you?

A. Nothing, only the room.

Q. How about maid service? Did they make up their own beds, or did you do that?

A. No, I did not. They did their own. [6]

Q. Did you serve any meals to any of these three?

A. Yes.

Q. How did they pay you, by the day or week or month? A. Semi-monthly.

Q. Prior to that time did you have people living there with you? A. I did.

Q. Kindly tell the court who they were.

A. Mrs. Drake moved in with me.

Q. She paid you for the time she was there?

A. That's right.

Q. Did she have her meals there? A. She did.

Q. Did you make her bed?

A. She took care of her own room.

Q. Who did you have in addition to her on those premises? A. Mrs. Emery and Mrs. Dempster.

(Testimony of Mabel E. West)

Q. Mrs. West, what was the average number of people residing at the premises, including yourself, from the time you moved in up to the month of May, 1948?

A. Not over four or five.

Q. After these two ladies who occupied the premises, do you recall any other parties who lived on the premises?

A. I didn't understand your question. [7]

Q. Who was there, in addition to Mrs. Drake and Mrs. Dempster, the other lady you mentioned? In addition to them who was there?

A. Mrs. Emery.

Q. Who else lived on the premises?

A. I had a lady and her daughter who were rooming there, and after Mrs. Dempster left, I had two boys.

Q. As someone would move out, would you get someone else to live there?

A. Yes.

Q. I believe it is admitted that you paid the rent up to and including the 15th of April 1948 at the rate of \$350 per month. Subsequent to the 15th day of April, 1948, and subsequent to the filing of this action, did Mr. Conrad ever demand of you rent over and above the sum of \$75 a month?

A. I paid him \$350 per month. I don't know anything about \$75 a month.

Q. That is up to April, 1948?

A. That's right.

Q. After you filed this suit against Mr. Conrad, you quit paying him \$350 a month, after that time?

A. Yes.

Mr. Leader: We will stipulate that after the 15th day of April, when she desisted from paying \$350 a month rent, [8] the defendant asked of her \$350 a month, none of which has been received since the 15th day of April, 1948.

(Testimony of Mabel E. West)

Mr. Breckenridge: Can you stipulate to the fact that on the 15th day of May, and the next two months thereafter, the plaintiff tendered the sum of \$75 per month to your client?

Mr. Leader: We cannot accept that stipulation. We consider it immaterial whether she tendered it or not. It is not material to the issues before the court.

The Court: It is well to know the status of the account, so the court will find the amount due. This being an equity action in this court, we can determine it, as a matter of fact; we can determine the amount due, and under an equity action, you have the right to inquire the conditions, up to the time of trial, because the chancellor can determine up to the date of the trial, and the court can find facts as they appear as of the date of trial. So specifically in a case like this it is well to know the state of the account as of today.

Mr. Leader: Very well.

Q. By Mr. Breckenridge: You paid \$350 a month for each month beginning the 15th day of March, 1947, up to and including the 15th day of April, 1948?

A. I did.

Q. And, in addition, you paid a deposit of \$700, of [9] which \$350 was to pay the amount due the last month?

A. That is right.

The Court: Of what does your family consist?

A. Myself.

Q. Are you a widow or a divorcee?

A. I am divorced.

The Court: Q. From the very moment you got in there did you occupy it?

A. I did, yes.

Q. You have used it for occupancy by yourself, and shall I call them paying guests—

(Testimony of Mabel E. West)

Mr. Wilson: Your Honor, that is something the court must determine. I will have to object to the witness being allowed to answer that question.

The Court: I am asking her who paid it.

Mr. Wilson: There can be no objection to that, but whether it was occupied as a guest house or a rooming house, that will be an issue in this case, and I don't want the witness to decide it.

The Court: I will withdraw the question. Let me put this question: From the time you went in there up to the present time you have had others occupy a portion of the premises for compensation paid to you?

A. That's right.

Q. The number of such persons is what? [10]

A. Right now there are only three in the place.

Q. What is the highest number you have had?

A. Four.

The Court: I want to say this in justification of my question: From this lease, assuming it speaks verity, it speaks of occupancy as a guest home, and gives the right to sublet. So the lease having called it a guest house, any inquiry as to a guest house is permissible. I don't understand the issue is made that it was occupied as a guest house. I understand the issue is that persons who were ill, and convalescents, and such.

Mr. Wilson: Yes.

Mr. Breckenridge: I want to say that the lease says "any other lawful purpose."

Q. By Mr. Breckenridge: Mrs. West, did Mr. Conrad tell you at any time that the premises had previously been used for the purpose of renting out rooms?

A. He told me a lady, prior to me, had lived in the place, and made a good living.

(Testimony of Mabel E. West)

Q. This term "guest home" was that something you suggested or asked be put in there, or mentioned at all to him?

A. No, sir, that lease was drawn that way. I did not suggest it that way.

The Court: You never intended to go in there without sharing it with others? [11]

A. That's right. I couldn't afford it.

The Court: That was why the provision was put in, that he gave you the right to sublet it, you remember that? A. Yes.

The Court: I notice there is a provision for public liability. A. Yes.

The Court: That was put in because other people were going to be there and they wanted to be sure that they were not going to be liable? A. That's right.

Q. By Mr. Breckenridge: Did you discuss the terms and character of the liability, or was it just put in without discussion?

A. There was a discussion on liability. Mrs. Drake, after she moved in, and I moved in, took out liability in her name herself, and paid for it.

Q. Did Mr. Conrad at any time discuss the registered ceiling on this property? A. No.

Q. He told you it ran about \$75 a month?

A. I am sure if he had I would not have paid \$350.

Q. You had no knowledge of that ceiling being on there at that time? A. No, sir, I did not. [12]

Q. That is all.

(Testimony of Mabel E. West)

Cross-Examination

By Mr. Wilson:

Q. Mrs. West, at the time that you rented these premises, in March, 1947, what was your business or occupation? A. A sanitarium.

Q. You were co-owner, were you not, with your then husband, of the Holly View Sanitarium?

A. That's right.

Q. Where is the Holly View Sanitarium?

A. 867 Lucile Avenue.

Q. That is out on Sunset Boulevard? A. Yes.

Q. How long had you been operating the business of the Holly View Sanitarium with your husband?

A. I have owned it I think since 1943.

Q. Are you still operating it now? A. Yes.

Q. What is the character of the premises of the Holly View Sanitarium?

Mr. Breckenridge: I think that is very far afield.

(Discussion.)

Mr. Breckenridge. I will withdraw the objection.

The Court: You may answer. [13]

A. To take care of elderly people, as their home.

Q. By Mr. Wilson: And did you, however, yourself, use the Holly View Sanitarium for the treatment of and diseases or ailments of any kind?

A. I took care of them, as the doctor brought them there, as guest and patient.

Q. You have an ad in the classified telephone directory as follows: "Holly View Sanitarium. 24 hrs. nursing service. Excellent meals—tray service. Convalescent & elderly. Specializing in heart & asthma. Member of Sanitarium Assn. of Calif. 867 Lucile Av., Normandie

(Testimony of Mabel E. West)

5508." That ad appears in the classified section of the Los Angeles telephone book? A. Yes.

Q. That has been in there for some time?

A. It certainly has.

The Court: You are not a registered nurse?

A. I am a graduate nurse.

The Court: You are not registered? A. No.

The Court: Q. Being on the register you would have to be open for engagement?

A. I am a graduate nurse from the Battle Creek Sanitarium.

Q. By Mr. Wilson: How did you find this place of Mr. [14] Conrad's? A. In the newspaper.

Q. What kind of an ad was it?

A. I couldn't tell you exactly, only it was a place for rent.

Q. It did not state it was business?

A. Not to my knowledge, it was not.

Q. Mrs. West, what did you tell Mr. Conrad that you intended to use these premises for, when you entered into this lease? A. For my home.

Q. Did you tell him you intended to bring from the Holly View Sanitarium convalescent cases who were not then in need of medical care? A. I did not.

Q. You made no such statement to him?

A. No.

Q. You stated you intended to use it as your home?

A. That is right.

Q. The court asked you what your family consisted of, and you stated you alone. A. That is correct.

Q. Did you intend to rent it to any roomers?

A. As I said before, the old lady, Mrs. Drake, was to live with me in the house. She was to share it. [15]

(Testimony of Mabel E. West)

The Court: And Mrs. Drake was someone else you brought there?

A. I did not. She was an old lady, and had her own property.

The Court: You knew her before you got it?

A. Yes. The reason I rented it, I was leaving the sanitarium, I had a breakdown and the doctor told me—

The Court: You can't tell that. I just asked you whether you brought her there, and you have answered.

Q. By Mr. Wilson: Your statement was that you intended to use it as your home. At that time was liability insurance spoken of?

A. No, sir.

Q. You never discussed it with Mr. Conrad?

A. No.

Q. At the time you removed to this property, a divorce suit was pending between yourself and Mr. West?

A. That's right.

Q. There was a dispute between you and Mr. West as to whether the property, known as Holly View Sanitarium, which you owned, was community property or not?

A. There was no dispute about it.

Q. Did you admit that it was community property?

A. Certainly.

Q. Did you have a conversation with Mr. Conrad as to [16] whether or not you might lose the Holly View Sanitarium, since there was a divorce suit?

A. Mr. Conrad did not know whether I was married or not.

Q. Did you tell Mr. Conrad, shortly after you got into the premises, that you were having trouble with your

(Testimony of Mabel E. West)

husband, and you wanted to borrow some money either from him, or someone else, in order to refinance a loan?

A. No, sir. I discussed this with him because he was a real estate broker, if he could sell the Holly View Sanitarium.

Mr. Manierre: What time, please?

Q. By Mr. Wilson: Approximately what time was it? A. I would say in November, 1947.

Q. You remember that in the divorce which you received in the other case, you entered into a settlement with Mr. West, after you had secured a loan sometime in January, 1948? A. That's right.

Q. After you entered into this settlement—you had previously settled with your husband, and he had no interest whatever in the business or real property on which that Holly View Sanitarium was located?

A. That's right.

Q. It was then, for the first time, you knew that your [17] husband either asserted or had an interest or claim in the business of the Holly View Sanitarium?

Mr. Breckenridge: I object—

The Court: Objection overruled. Read the question.

(Question read by the reporter.)

A. Yes.

Q. By Mr. Wilson: Did you tell Mr. Conrad, during this period of time we have just discussed, that is, in November, that you felt there was a danger of your losing the Holly View Sanitarium? A. No, sir.

Q. Did you tell him there was a possibility that your husband might be able to assert a claim and sell it, and have the proceeds divided? A. No, sir.

Q. Did you discuss with Mr. Conrad his attempt to secure a loan for you? A. I did, yes.

(Testimony of Mabel E. West)

Q. Tell us what he said.

A. He said he would try and get me a loan.

Q. By Mr. Manierre: What time?

A. In December, 1947, around Christmas time.

Q. By the Court: How did the question of a loan come up?

A. Because at that time, I thought I wanted to buy out his share, if I could make a loan. [18]

The Court: You discussed it with Mr. Conrad?

A. Yes. I talked to him about selling the property, after it was decided he could maybe get a loan on it, and buy out the share, and I could keep the property myself.

Q. By Mr. Wilson: As a matter of fact, you and your husband entered into an escrow at a branch of the Security-National Bank, for the sale of the property?

A. Yes, that is correct.

Q. You didn't get the money?

A. We didn't get the money.

Q. Did any doctor ever come to this house?

A. No, sir.

Q. Do you know Dr. Wescott?

A. I do. He was at that time my own physician.

Q. Did he ever come to the house?

A. To see me, yes.

Q. Did he ever see anybody else that you know of?

A. No.

Q. Did you never remove any patient from the Holly View Sanitarium, or from the premises, the subject of this action?

A. I did not.

A. I don't mean physically. Any who may have come to your place.

A. Two came to the sanitarium. [19]

(Testimony of Mabel E. West)

Q. What were their names?

A. Mrs. Kline and Mrs. Dempster.

The Court: That was at the beginning?

A. Two months after.

The Court: Did they remain there any length of time?

A. Both had a stroke, and had to be removed.

The Court: They were elderly persons?

A. Yes, over 70.

Mr. Wilson: That is all.

Redirect Examination

By Mr. Breckenridge:

Q. Mrs. West, a proposed escrow of the property, was that prior to the time of entering into the lease?

The Court: Which one.

Mr. Breckenridge: That was not September, 1947.

The Court: After you moved in? A. Yes.

The Court: Were divorce proceedings pending at the time of this lease, or later?

A. The divorce was pending when I moved away from the sanitarium.

The Court: How long since it had been instituted? When did you begin your divorce?

A. October, 1946.

Q. By Mr. Breckenridge: Mrs. West, have Mrs. [20] Dempster and Mrs. Kline ever received any treatment or nursing treatments from you while at your premises?

(Testimony of Mabel E. West)

A. All they received were the meals I cooked.

Q. Were they bedridden? A. No, sir.

Q. They would go out to church? A. Yes.

The Court: They were ambulatory patients?

A. I would call them just guests.

The Court: Were they patients who could take care of themselves?

A. They could take care of themselves. I just cooked the meals.

Q. By Mr. Breckenridge: They received no treatment? A. No.

Q. Were any ambulances there?

A. None except when they came to move them from the house.

The Court: I spoke of ambulatory.

A. They were.

Q. By Mr. Breckenridge: There were no drugs, medicine, physiology or any treatments of any sort ever given to these people in your home, to your knowledge?

Mr. Leader: The court was trying to make clear whether there were any ambulatory patients. [21]

A. There was no ambulance except when it came to remove them from the house to the hospital.

Q. That is all.

(Whereupon a recess was taken until 2:00 o'clock P. M. of the same date.) [22]

Los Angeles, California; October 12, 1948;
2:00 O'Clock P. M.

Mr. Breckenridge: I would like an opportunity to ask Mrs. West one or two questions I failed to ask this morning.

Further Direct Examination

By Mr. Breckenridge:

Q. Mrs. West, do you know how the telephone listing is made up of the residence occupied by you on Hollywood Boulevard, the subject of this action?

A. I do.

Q. Give us that list.

A. Mabel E. West, 7462 Hollywood Boulevard.

Q. Has there ever been any advertising in the telephone book, newspapers, or on the premises, or any advertising concerning this property or the use thereof, which you prepared, published, or printed, or anyone under your direction? A. No, sir.

Q. Was there ever any license to conduct any business on Hollywood Boulevard, sought by yourself, or applied for by you? A. No, sir.

Q. And none was ever received? A. No, sir.

Q. The sanitarium at this other location, testified [23] by you this morning, the advertising concerning that has been continuous for a number of years?

A. That's right.

Q. What is the size of the sanitarium, where you have the other address? A. Fourteen rooms.

Q. And you conducted the sanitarium there prior to meeting Mr. Conrad, and up to the present time?

A. Yes.

Q. Continuously? A. Yes.

(Testimony of Mabel E. West)

Q. You have a license there to operate that business?

A. I do.

Q. What was the condition of your health at the time you approached Mr. Conrad to lease these premises?

A. I was in very poor health, I had a breakdown.

The Court: I think the witness so stated this morning.

Mr. Breckenridge: That is all.

The Court: Any cross?

Mr. Wilson: No, your Honor.

By the Court: Q. Mrs. West, you testified that Mr. Conrad was in his office and you came and told him that you were not going to occupy it alone, is that true?

A. I and Mrs. Drake went there looking for homes. I was looking for a place to live. [24]

Q. What did you tell him you wanted it for?

A. For ourselves.

Q. For yourself and herself? A. That's right.

Q. You said this morning that nothing was mentioned about having guests or roomers. Was that mentioned at the time you talked to him?

A. The only thing was, if we could rent out other rooms, other bedrooms.

Q. Who asked him that? A. I did.

Q. You asked him if you could do that?

A. Yes.

Q. When the lease was written, that was put in and gave you the right to sublet? A. Yes.

Q. In other words, the suggestion about renting it to others came from you? A. Yes.

Q. You told him about renting to others, and asked him the right to do so, before the lease was written, is that right? A. Yes.

(Testimony of Mabel E. West)

Q. By Mr. Breckenridge: Was that before you told Mr. Conrad you couldn't pay that amount of rent, and asked him [25] if you could have roomers there?

A. Yes, that's right. I couldn't myself have paid it individually.

By the Court: Q. How many rooms were there?

A. Three bedrooms, a living room, a dining room, a kitchen, and breakfast room.

The Court: That is all. Any questions, Mr. Wilson or Mr. Breckenridge?

Counsel: No, your Honor.

The Court: Call your next witness.

Mr. Breckenridge: I was just going to introduce a document.

The Court: Go ahead.

Mr. Breckenridge: Your Honor, I would like to introduce as plaintiff's exhibit next in order what purports to be a certified copy of the registration with the Federal Housing Authority.

The Clerk: Plaintiff's Exhibit No. 2.

The Court: All right.

(The document referred to was marked Plaintiff's Exhibit No. 2 and received in evidence.)

The Court: Gentlemen, before we proceed, we had better find the date of this. The effective date is 11-1-42.

Mr. Manierre: That is right.

The Court: I think there is one matter, gentlemen, to [26] conform to the rules—the request for admissions and reply to the request have been referred to by you. They should be received or offered in evidence.

Mr. Breckenridge: I move to introduce in evidence the request for admissions and answers.

The Court: It will be received as one exhibit, 3. The request was filed July 24, 1948, and the reply was filed August 5th.

(Discussion.)

Mr. Breckenridge: I have here three checks, one for \$75 dated May 14, 1948—we can save the record by stating that the tendered checks were for \$75 for three months, May, June and July.

Mr. Wilson: That is satisfactory.

The Court: I think we should have the plaintiff here explain for the benefit of the court how she came to make a tender, and we will have the circumstances which led to her making the tender, whether it was on the advice of counsel, whether she ever talked to him. That is always material.

MABEL E. WEST

recalled, was examined and testified further as follows:

By Mr. Breckenridge:

Q. Mrs. West, I understand the rent was paid April, at the rate of \$350 per month.

A. That's right. [27]

Q. Subsequent to that date did you tender or pay any other amount for rent to Mr. Conrad?

A. I don't quite understand the question.

Q. Were there any other amounts tendered him after your payment of \$350 on May 15th?

A. Yes, I think on the 15th of May—I don't remember exactly the date—after Mrs. Drake left, the first

(Testimony of Mabel E. West)

part of May I couldn't pay my rent, and I wanted to get away from my lease. I was trying to rent the place, because I couldn't pay \$350 a month. Everybody told me it was too much rent. I went to the OPA, down to the Price Administration, and asked if there was a ceiling on that piece of property. That was when I found out what the ceiling was.

Q. That was the first knowledge you had that the registered ceiling was \$75 a month?

A. Yes. The ladies that I talked to at the OPA advised me to get a lawyer.

Mr. Wilson: I move to strike that out, your Honor.

The Court: It may be stricken out.

Q. By Mr. Breckenridge: Your tenders of \$75, that is, the tenders made in May, June and July 15th, were made upon the advice of your counsel?

A. That's right. They were returned without comment.

The Court: After you talked to this lady at the Office of Price Administration, or Housing Expediter, did you talk [28] to Mr. Conrad and tell him you had learned this, and tell him you were not going to pay any more rent, or did you just get a lawyer?

A. That's what I did.

Q. By the Court: You did not ask whether the other woman had a lease such as you had? A. No.

The Court: You merely went to the lawyer and made your tender to him? A. Yes.

Q. That is all.

ALBERT G. WESTCOTT,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Leader:

Q. Dr. Westcott, you are practicing medicine and surgery, are you? A. I am.

Q. Are you a doctor of medicine? A. An M. D.

Q. Where did you get your degree from?

A. The College of Medical Evangelists, Los Angeles.

Q. Are you engaged in the practice of your profession? [29]

A. At the present time I am at the University of California, graduate medicine; however, I have practiced in Los Angeles.

The Court: You are licensed to practice in the State of California? A. Yes.

Q. By Mr. Leader: Are you acquainted with the plaintiff, Mrs. West? A. I am.

Q. How long have you been so acquainted with her?

A. Since June, 1946.

Q. Tell the court how you became acquainted with her.

A. In January, 1946, I took over some patients who had been under the care of an elderly doctor who was retiring, by the name of Ryder. I took care of those patients at the Holly View Sanitarium.

Q. You succeeded to his practice? A. Yes.

Q. That is how you became acquainted with the plaintiff, Mrs. West? A. Yes.

Q. Have you ever treated the plaintiff personally?

A. Yes, sir.

(Testimony of Albert G. Westcott)

Q. Are you acquainted with the premises at 7462 Hollywood Boulevard? [30] A. Yes.

Q. Tell the court, please, how you first became familiar with this address, and the circumstances attending your talking with this plaintiff.

A. I can't give you the exact dates. It was approximately April, 1947.

Q. That was approximately April, 1947?

A. Yes.

Q. Where did this conversation take place?

A. At the Holly View Sanitarium.

Q. Do you recall who else was present at that conversation? A. No one.

Q. Tell the court as nearly as you remember exactly what Mrs. West said to you.

A. She was obtaining a divorce, and the procedure—

The Court: Are you stating what she told you?

A. Yes, and she was at that time attempting to divest herself of the Holly View Sanitarium. She spoke of taking some patients from the sanitarium to Hollywood Boulevard, and giving up the Holly View Sanitarium.

Q. At that time, were any of your own patients, or the patients to which you have succeeded through the other doctor you mentioned, being confined in the Holly View Sanitarium? A. Yes, one woman. [31]

Q. What was her name? A. Mrs. Dempster.

Q. Was Mrs. Dempster removed from the Holly View to the Hollywood Boulevard Sanitarium? A. Yes.

Q. With your approval? A. Yes.

Q. What kind of care was being administered to Mrs. Dempster at the Holly View Sanitarium?

A. Sanitarium care.

(Testimony of Albert G. Westcott)

Q. Can you tell us what she was suffering from?

A. High blood pressure and strokes.

Q. What was her age?

A. Approximately 78. I don't have the record with me.

Q. And your personal opinion, Doctor, was that she needed medical care? A. Yes.

Q. After she was removed from the Holly View Sanitarium to the Hollywood Boulevard Sanitarium did you continue to treat her? A. Yes.

Q. Would you say she continued to have need for medical care? A. Yes.

Q. Do you know how much money Mrs. Dempster paid to [32] Mrs. West, for the ambulatory care she received?

A. I don't have anything but hearsay as to that.

Q. You had occasion to visit Mrs. Dempster at the Hollywood Boulevard Sanitarium? A. Yes.

Q. You were told by Mrs. West that a sanitarium was being conducted there? A. Yes.

Mr. Manierre: I object to that as leading and suggestive.

The Court: Sustained. Was Mrs. Dempster capable of taking care of herself? A. She was not.

The Court: Was she capable of taking care of her room without assistance?

A. Possibly, if she so desired. She was financially independent.

Q. When you had occasion to visit Mrs. Dempster, at the Hollywood Boulevard premises, did you see any other persons there? A. Yes.

Q. Do you know by name the people you saw?

A. I met some of them, and I saw one person I knew as a patient, but I don't recall the name.

(Testimony of Albert G. Westcott)

Q. The first time *you him*, you saw him at the Hollywood [33] premises? A. Yes.

Q. You saw him in a professional capacity?

A. Yes.

Q. And you treated him? A. It was a woman.

Q. Do you recall for what you treated her?

A. I do not.

Mr. Manierre: I don't think he should relate it.

The Court: He can't answer the question anyway. You have described to me here that you found Mrs. Dempster. Incidentally, she was a patient following her stroke? A. Yes.

The Court: What did she have, a cerebral hemorrhage?

A. She was not under my care at that time.

Q. By the Court: You say you took care of her. In what condition did you find her?

A. She was in bed when I came to see her.

Q. By the Court: How many times during that period of time she was there did you see her?

A. Twice.

The Court: Each time she was in bed?

A. Yes.

The Court: Who called you?

A. Mrs. West. [34]

The Court: Was she under medication?

A. Yes, the woman took potassium.

Q. So she was under your care, your direction?

A. Yes.

Q. By Mr. Leader: This man you told us of, do you recall what you treated him for?

A. I don't. There was a man whom I met there. I couldn't be sure whether I saw him professionally or not.

(Testimony of Albert G. Westcott)

The records I have on that are in storage, and I haven't had time to dig them out.

The Court: By whom were you called to see him?

A. Mrs. Dempster.

Q. Who told you? A. Mrs. West.

The Court: She gave you his name and designation?

A. Yes, I was introduced to him.

The Court: She asked you to look him over?

A. Yes.

Q. By Mr. Leader: Did you have occasion to visit the Hollywood Boulevard premises and to observe the physical condition of other persons at those premises?

A. I saw other persons at the premises. When I saw them they were ambulatory.

Q. What was the average age of the persons you saw on those premises? [35]

A. They were all elderly persons.

Q. Did you see any blind persons?

A. Yes, there was a blind woman.

Q. Doctor, can you tell me, please, who paid you for your visit to Mrs. Dempster?

A. Mrs. West paid me. I understood she did it, from Mrs. Dempster.

Q. Were you paid for your visit to this man you have spoken of? A. No.

Q. Did you ever have a conversation with Mrs. Drake in which she told you to what use the Hollywood Boulevard premises—

Mr. Manierre: Unless she was present I would object—

(Discussion.)

The Court: I will permit this, subject to a motion to strike.

(Testimony of Albert G. Westcott)

Q. By Mr. Leader: Doctor, in your conversation with Mrs. Drake, did Mrs. Drake ever tell you to what use the premises at 7462 Hollywood Boulevard were to be put?

A. She told me it was to be used as a rest home.

The Court: When was that? A. March, 1947.

The Court: After you called at the place?

A. No, before. [36]

The Court: Where did you find out about Mrs. Drake having anything to do with the matter?

A. I visited Mrs. Drake at her home, where she resided before she moved out there.

The Court: Did Mrs. West ever mention Mrs. Drake before she moved out there?

A. No, not in this connection.

Q. By Mr. Leader: Is Mrs. Drake also a patient of yours? A. Yes.

Q. Did Mrs. Drake consult you about meeting you at 7462 Hollywood Boulevard?

A. She did not have an opportunity of meeting me for that particular purpose.

Q. Nothing further.

Cross-Examination

By Mr. Breckenridge:

Q. Dr. Westcott, you saw, these numerous times you were there, you saw a lot of people, and they were all elderly people?

A. I did not say I was there numerous times.

Q. There were also elderly people?

A. I saw several.

Q. Tell us the first time you were there?

A. At Hollywood Boulevard? [37]

(Testimony of Albert G. Westcott)

Q. At Hollywood Boulevard.

A. I should say in June, 1947.

Q. That was the first time you went there?

A. Yes.

Q. You saw Mrs. Dempster at that time?

A. Yes.

Q. At that time, at the same time, did you see Mrs. West there on that occasion?

A. Yes, I did.

Q. Did Mrs. Dempster do the room and her own bed?

A. Both, I guess.

Q. Was that a hospital bed?

A. It was a low bed of the type you ordinarily find in a bedroom. It was not a hospital bed.

Q. Was there furniture in there of a hospital nature at all?

A. Not that I recall offhand.

Q. Did you see any other rooms in the house?

A. One other.

Q. How was it furnished?

A. The same way.

Q. Did you see some physio equipment around the house?

A. I don't recall.

Q. As a matter of fact, isn't it true and Mrs. Dempster dressed and undressed herself during all of this time [38] up to the time she had a stroke?

A. Not to my knowledge.

Q. Would you say she did not?

A. I never inquired.

Q. Do you know whether she walked around and went to church?

A. I know she walked around. I don't know that she left the premises by herself.

Q. If I stated that she went to church would you say her condition permitted that?

A. I would say it was not advisable for her to do so.

(Testimony of Albert G. Westcott)

Q. When was the next time you saw her after June?

A. About October.

Q. What other calls did you make besides the one in June?

A. Those were all the calls I made to see any patient, except Mrs. West and Mrs. Drake.

Q. Is it true, Dr. Westcott, that Mrs. West discharged you from her service? A. No.

Q. Isn't it true that she discharged you on account of your alcoholism? A. No.

Q. Isn't it true that you gave up practice because of that condition? [39] A. No.

Q. Isn't it true that you went to a hospital for treatment?

A. I have been in hospital for treatment for a nervous breakdown.

Q. Isn't it true that you showed up in her sanitarium on numerous occasions intoxicated?

A. That is not true.

Q. You showed up there after you had indulged in alcoholic beverages?

The Court: His morals are not an issue, as to whether he has or not taken a drink. The doctor is entitled to protection. I want him to answer the last question. You may answer.

Mr. Breckenridge: Read it.

(The last question was read by the reporter.)

A. You want me to answer that?

The Court: Yes, if you want to. I think in justice to yourself that you ought to answer.

A. The answer is No.

The Court: You may be excused.

LUE MINOR DRAKE,

called as a witness by and on behalf of the defendants having been first duly sworn, testified as follows:

The Clerk: State your name. [40]

A. Mrs. Lue Minor Drake.

Direct Examination

By Mr. Leader:

Q. You are acquainted with the plaintiff in this action?

A. Yes, I am.

Q. When did you become acquainted with her?

A. Oh, quite a little while back, and during the time that Dr. Westcott was the doctor at the Holly View Sanitarium. I talked to her over the phone. I became acquainted with her through his calling at the Holly View.

Q. Mrs. Drake, when did you become familiar, if you have become familiar, with the premises at 7462 Hollywood Boulevard?

A. At the time Mrs. West was looking for another location and home, and I was looking for a place where I could rest, and be free from the cares of my household, and I knew that her sanitarium had a good name.

Q. When did you first hear of the premises at 7462 Hollywood Boulevard—what time, what year and what month, if you recall?

A. It was previous to March, 1947.

Q. How did you become familiar with the premises?

A. She took me out in the car to see them. She said that— [41]

Q. I did not ask you what she said.

Mr. Breckenridge: No. Say what Mrs. West told you concerning these premises at that time.

A. I think the only way I can explain it, she said, before we got there, that if she sold the Holly View she wanted a place to live and would have a rest home.

(Testimony of Lue Minor Drake)

Q. Did Mrs. West tell you how she became familiar with the premises?

A. She showed me an advertisement which Mr. Conrad said he had put in. She explained that was a good location, and it was in a district for this business. Her idea was to have a rest home when she sold her own place, and she asked me to go in business with her. I said no.

Q. Were you present at the time negotiations for this lease were pending? A. Yes.

Q. Did you hear the conversation? A. Yes.

Q. Tell us what was said by Mr. Conrad and by Mrs. West with regard to the lease.

A. In the first place, we looked the house over and the rooms that could be used. She could use the breakfast nook, the downstairs bedroom, and three upstairs rooms were very fine, almost elegant. She thought them very fine, and that it was a very fine place. She looked it over, and said, [42] "I could have a lot of people upstairs. My family will be down. I could stay downstairs."

Q. Tell the court what was said by Mrs. West and Mr. Conrad concerning the leasing of these premises.

A. Mr. Conrad said he could consider only a doctor or a nurse. He said, "I want a professional business-woman. I would consider a nurse. I think she is qualified, because she has a good rest home."

Q. Did you hear Mr. Conrad ask her if she could qualify to be a nurse? A. Yes.

Q. When did you move in? A. March 20th.

Q. When did you move out?

A. I think it was May 4, 1948.

Q. During your stay in these premises did you learn of a person by the name of Mrs. Mary Dempster?

A. Mrs. Mary Dempster.

(Testimony of Lue Minor Drake)

Q. Who was she?

A. She was a woman of some means who had suffered a stroke—at least was suffering from high blood pressure. She had been at the Holly View Sanitarium.

Q. Do you know how old she was?

A. Ninety-two, she told me.

Q. Do you know how much money she paid Mrs. West? [43]

A. \$200. I will tell you how I know. I said to Mrs. West, "Don't you think that \$350 is a little high?" And she said, "I have two patients at the Holly View Sanitarium, Mrs. Dempster at \$200 a month and Mrs. Kline at \$150 a month. That will pay the rent."

Q. Did you know Mrs. Kline?

A. Yes. She was the other lady. She also had a stroke, but at the Holly View Sanitarium she would share the room with Mrs. Drake.

Q. Are you acquainted with Mrs. Ewing?

A. Yes.

Q. Who was she?

A. She was a nurse at Mt. Sinai.

Q. Did she ever come to the Hollywood Boulevard premises? A. Yes.

Q. What did she do there?

A. She was with the patient upstairs. At that time the front room had an elderly gentleman, about 75, whom Mrs. Ewing had recommended to Mrs. West.

Q. Do you remember his name?

A. I don't remember his name.

Q. Do you know what ailment he was suffering from?

A. Old age, and the trouble that goes with it.

Q. Do you know how much he paid Mrs. West? [44]

A. Mrs. West said she was going to have \$250.

(Testimony of Lue Minor Drake)

Q. Do you know whether narcotics were administered on the Hollywood Boulevard premises?

A. She did it. He demanded it, while he was at the Holly View Sanitarium, a large part of the time.

Q. Did you know Mrs. Edward Emery?

A. Yes.

Q. Who is she?

A. Mrs. Emery had the little middle room and paid \$150 a month.

Q. She was there when?

A. Almost from the beginning.

Q. How much did she pay to Mrs. West?

A. \$150. I have seen the check.

Q. Which room did you occupy?

A. I was downstairs.

Q. This food, do you know where it is prepared?

A. In the kitchen. Mrs. West said she would not be able to do any cooking, and if I cooked for myself and Mrs. Emery I could stay. Mrs. Emery and I remained.

Q. Did you ever hear Mr. Conrad mention to Mrs. Drake anything about carrying liability insurance?

A. I don't know anything about insurance. I have heard the words, but I have no knowledge.

Q. At the first conversation with Mr. Conrad, did you [45] hear how much Mr. Conrad asked Mrs. West for the rent?

A. Yes, \$350.

Q. Was anything said by Mr. Conrad in the way of offering other premises to Mrs. West?

A. Yes, he said he would vacate half of the house. He agreed to vacate the other half of the house, and open the door upstairs, so there would be communication.

(Testimony of Lue Minor Drake)

Q. Did he say how much he wanted for the entire premises?

A. I don't remember. I may have heard it, but I don't remember.

The Court: You told us about some furniture. You did not say what the furniture was.

A. I had used five or six rooms; about six rooms, half Oriental rugs.

Q. You took them over?

A. I took them over, the Oriental rugs, in the rest home.

Q. How much did you pay? A. \$100.

The Court: Did you get your own meals?

A. After she left I got my own meals and Mrs. Emery's—three meals a day.

The Court: Prior to that time you did all the cooking?

A. Sometimes the maid from the Hollywood Sanitarium [46] got the meals; sometimes Mrs. Ewing, and sometimes Mrs. West. Mrs. West was a very good cook, and a fast one.

Q. Other than Mrs. Ewing—did you ever see the old gentleman puttering around the kitchen, and preparing meals?

A. No, no one prepared meals there. The meals were in fact trays they put in the dining room.

Q. Do you know if Mrs. West ever entered into negotiations to sell Holly View?

A. I understood—this is hearsay.

Mr. Leader: We have no further questions.

(Testimony of Lue Minor Drake)

Cross-Examination

By Mr. Breckenridge:

Q. Mrs. Drake, do you remember testifying in the Superior Court action several weeks ago?

A. Yes, I remember.

Q. Do you remember testifying at that time Mr. Conrad said he would only rent them to a doctor or a lawyer?

A. Not to a doctor or a lawyer. It was to a doctor or a nurse; not to a lawyer.

The Court: He is asking if you made that statement to the Superior Court; he is saying a doctor and a lawyer.

A. I don't think I said anything of the kind because a lawyer was never considered by Mr. Conrad in my presence.

Q. By Mr. Breckenridge: I call your attention to that testimony, and do you recall my asking you if you remembered [47] any more of that conversation, and you stated that was all. A. What conversation?

Q. The conversation when you and Mrs. West were at Mr. Conrad's home.

Mr. Leader: I object to that question—

Q. By Mr. Breckenridge: Do you recall my asking you when you were on the stand in the Superior Court whether or not you remembered if there was any other conversation that you recall, between the three of you, other than the fact that he stated the property he would

(Testimony of Lue Minor Drake)

only rent for the purpose he testified, either to a doctor or nurse or doctor or lawyer? A. No lawyer.

Mr. Wilson: I object to that question—

The Court: The witness has answered.

Q. By Mr. Breckenridge: At that time you said you recalled no other conversation. Do you remember so testifying?

A. I answered the question, what he asked me, but that question does not carry any meaning. I can't gather what the man means.

Q. Mrs. Drake, this furniture you used was just in the living room downstairs?

A. It was all around the house.

Q. There was certain furniture purchased? [48]

A. Yes. Mrs. West bought furniture. You want me to tell you that?

The Court: I don't think it is material.

Mr. Breckenridge: I want to show the type of furniture that has been used in the house by Mrs. West.

Q. Do you know where that was bought?

A. She said it was bought on Main Street. She did not mention where.

Q. You were quite friendly with Mrs. West at that time? A. I am still very friendly.

Q. You are still very friendly? A. Yes.

(The court here took a short recess.)

W. E. CONRAD,

one of the defendants, sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

By Mr. Leader:

Q. You are the owner of the premises the subject of this litigation, are you? A. Yes.

Q. At the time that has been stated, Mr. Conrad, did you offer the subject premises for lease by advertising the same in a newspaper of general circulation? [49]

A. I did.

Q. In what papers?

A. The Medical Journal, Los Angeles County, the Los Angeles Times, Hollywood Magazine.

Q. I show you an extract which reads, L. A. County Medical Journal, and ask you if that is a copy of the kind of advertisement which you caused to be published in the Los Angeles County Medical Journal.

A. That is one of them. I had three different ads.

Mr. Manierre: To which we object. There is no evidence that the defendant did see them.

The Court: Regardless of whether she saw the particular advertisement or not, I think this inquiry is material.

Mr. Manierre: We will withdraw the objection.

Q. By Mr. Leader: Is this extract a correct extract of what the L. A. County Medical Journal had?

A. Correct.

Q. Is it in form and substance the same kind of advertisement? A. It is.

Mr. Leader: May it go in?

The Clerk: A.

(Testimony of W. E. Conrad)

(The document referred to was marked Defendants' Exhibit A and received in evidence.)

Q. By Mr. Leader: When did you first meet Mrs. West? [50]

A. On the 2nd day of March, 1941.

Q. Did she make reference to the newspaper classified ad?

A. She had the newspaper with her.

Q. Had you seen her before? A. No.

Q. Did you have a conversation with her?

A. Yes.

Q. Where? A. At 7462 Hollywood Boulevard.

Q. Who were present?

A. Mrs. West and myself.

Q. Was Mrs. Drake present?

A. She was not present.

Q. State what was said by you and Mrs. West.

A. She wanted to know about the property I was advertising. I queried her to see whether she could answer to the qualifications.

Q. What was said?

A. I first asked her, to see whether she could run the business; that the property was being operated as a professional building; that I could let her have the whole property, or half.

Q. What was her reply?

A. She was interested only in the portion which comprised three thousand. [51]

Q. What was the use she was going to make of it?

A. She owned the Holly View Sanitarium, and was going to take the house for ambulatory patients. I said, "Where do you find the patients?" She said, "They are furnished to me by the doctor." After that we discussed

(Testimony of W. E. Conrad)

in detail the zoning. I got out the map and showed her the zoning, and I told her I proposed to make this a professional building. I told her what the ceiling was, and so forth, and she said she knew all about it. Then she said, "What would you take for the premises?" And offered \$350 a month.

Q. What was the date of that?

A. March 2, 1947.

Q. When was the next time you had a conversation with her? A. On March 3, 1947.

Q. What did she say on March 3, 1947?

A. She and Mrs. Drake came out there together. Both went through the property. We had a conference and it was similar to the first time she was there.

Q. Was anything further said?

A. Yes, Mrs. Drake commented on the business, the fine type of business Mrs. West had at the Holly View Sanitarium. In fact, she gave Mrs. West quite a build-up.

Q. What is your business?

A. Real estate broker. [52]

Q. For how long?

A. Since the 19th of March, 1944. Mrs. West had the nurse from the Holly View Sanitarium come to inspect the premises, and they both went over it, and said what a fine place it would be for ambulatory patients. She gave me that day \$200 deposit, and asked me to draw a lease for \$350 a month.

Q. Was that all that was said? A. Yes, about.

Q. When did you have another conversation?

A. On March 4th.

(Testimony of W. E. Conrad)

The Court: Was March 4th the time when Mrs. Drake was there?

A. March 3rd was when Mrs. Drake was there. Mrs. West gave me the money, and I turned the keys over.

The Court: Is this the lease you are talking about? (Showing same to witness.) A. Yes.

Q. The property there? A. Yes.

The Court: You drafted it yourself? A. Yes.

The Court: There is some handwriting. Is that yours?

A. Yes.

The Court: I am referring to the designation on the [53] back of the lease: W. E. Conrad, dated March 4th. A. Yes.

Q. This lease refers to the use of these premises as a guest house or any other lawful purpose. Was any conversation had between you and Mrs. West concerning this clause?

A. It was to be used for professional purposes.

Q. Was anything said by Mrs. West about the part wherein it states that it was to be used for a guest home, or any other lawful purpose?

A. She was to bring in her clientele of ambulatory patients.

Q. Did you discuss with her a guest house?

A. She asked me if I had any objection to a sign in front of the building. I said, "Certainly not, if it conforms with the ordinance of the City, and is not objectionable to the neighbors."

Q. When did you next have a conversation?

A. She wanted to redecorate the entire premises, with the possible exception of two rooms.

(Testimony of W. E. Conrad)

The Court: Go ahead.

A. As I recall, it was the following day she was over there, and asked me about painting, and the color she wanted. I told her I just had a painter paint the entire kitchen. She asked me what it would cost to get all the painting, and as I remember, it ran something like \$250 to repaint all the [54] floors and bedrooms, and after they got about two-thirds done she decided she wanted the entire thing painted, and the bathroom, and it was all painted.

Q. You have referred to a pending divorce between Mrs. West and her husband. Was that a subject of any discussion between you and Mrs. West?

A. Not until she had been there about three months. She asked me if I could help her sell the Holly View Sanitarium; she and Mr. West were getting a divorce.

Q. What did you do?

A. The first time she told me of the attorney it was in escrow. She came down and introduced attorney.

Q. What was his name?

A. I don't remember what his name was. I asked how long the escrow called for, 60 days, and they said no, "It is 90."

Q. Was that attorney Mr. Wendt?

A. That is the correct name.

Q. In Mr. Wendt's office was anything said about the lease?

Mr. Manierre: That is leading the witness.

The Court: He has a right to lead.

A. Mrs. West told Mr. Wendt I was her landlord; that I was also a real estate broker, and I was asked to see if I could help her sell the Holly View Sanitarium, and Mr. [55] Wendt—

(Testimony of W. E. Conrad)

The Court: I don't think it is necessary to go into the details.

Mr. Leader: It is only in corroboration of the testimony.

The Court: Let me ask this question: You say in certain conversations the rent was mentioned?

A. There was an OPA ceiling. Mrs. Le Grange had paid \$75 a month, which was frozen, and barely paid the taxes.

The Court: You said something about zoning.

A. I even showed her the zoning map and the city of Los Angeles classification of June, 1946, of 4-R. I told her I wasn't so sure about the second floor. That had an outside stairway, and it would not allow her to have ambulatory patients. She said she would have her foreman from the Holly View Sanitarium inspect the property, before she ever signed a lease.

Q. You said something about a sign, was a sign put up?

A. Not until after Mrs. Drake moved out. As I remember that was April, 1948.

Mr. Leader: That is all.

Cross-Examination

By Mr. Breckenridge:

Q. I believe you have been in the real estate business here for some time. [56] A. Since 1918.

Q. You prepared this lease yourself? A. I did.

Q. You had rented this property for a number of years prior to this for \$75 a month?

A. I had rented it since March, 1942, for \$75 a month.

Q. You registered this property for \$75 a month?

A. I did.

(Testimony of W. E. Conrad)

Q. You rented this property?

A. I rented it until I rented it to Mrs. West.

Q. She knew exactly what you received for it—who was the lady prior to her? A. Mrs. Le Grange.

Q. As a matter of fact, wasn't Mrs. Le Grange—

A. No. She was there on a month-to-month tenancy of \$75 a month.

Q. You don't know whether they kept roomers or not?

A. I don't know. I told Mrs. West that Mrs. Le Grange paid \$75 a month.

Q. Isn't it a fact that you caused to be prepared a notice—

A. I gave her a notice in January, 1946, that the zoning had been changed on Hollywood Boulevard, and I was going to change the classification and lease the property as business property, and that I would like to have the house [57] as early as possible.

The Court: How long did she stay?

A. Seven months.

Q. By Mr. Breckenridge: Mr. Conrad, what changes, if any, did you make, up to the present time?

Mr. Leader: We object to that as argumentative and immaterial.

The Court: Overruled.

A. I did some redecorating, some plastering.

Q. What redecorating?

A. In the kitchen, and some plastering of the wall in the kitchen, and redecorated the breakfast room.

Q. You repainted these rooms?

A. I did, in February, 1947.

(Testimony of W. E. Conrad)

Q. That is, you just repainted the walls yourself?

A. I didn't do it myself. I had it done.

Q. What did you do in that connection? Did you re-plaster the entire kitchen?

A. I replastered where the plaster had been damaged and broken in four or five different places. Also I changed some plumbing which had to be repaired.

Q. How big a patch?

A. I would say six inches to six feet.

Q. That was patching up what had been damaged?

A. Yes, that's right. [58]

Q. That was for the purpose of cleaning up and for the purpose of renting, was it? A. It was.

Q. I understand you to testify that on March 4th, when Mrs. Drake was there, the property was leased?

A. That was March 3rd, when Mrs. Drake was there; they told me to prepare the lease. It was March 4th, when the nurse and Mrs. West from Holly View came over and signed the lease. I prepared the lease the night of March 3rd, as I recall.

Q. Then you had them sign on March 4th?

A. Yes. They gave me \$200.

Mr. Manierre: \$700? A. \$500 on March 4th.

Q. By Mr. Breckenridge: You have lived right next door? A. Yes.

Q. You were in the premises from time to time?

A. Not a great many.

Q. Have you seen any physiotherapy or medical apparatus? A. I have seen a great many.

Q. How much have you seen?

A. They could hardly take care of themselves. They had help.

(Testimony of W. E. Conrad)

Q. Who had the nurse? [59]

A. An old gentleman and Mrs. Emery, who was so blind she could hardly feel her way around her room. I have seen a lady almost helpless, and one lady died there.

The Court: You don't mean Mrs. Drake?

A. I don't mean her.

Mr. Breckenridge: You say that some person was ill?

A. I was told that she died.

Q. You made no reregistration of this property?

Mr. Leader: We stipulate that he did not.

The Court: You may answer that.

A. I did not.

Q. By Mr. Breckenridge: You were particularly concerned in renting this to Mrs. West because she was a nurse?

A. She was a registered nurse, and would qualify as a professional business. We went into that very thoroughly, because I wanted to qualify it as a doctor's clinic; that is what I had in mind; but when she told me the clientele she had, I said it was satisfactory.

The Court: Q. At the time, the property was available? A. Yes.

The Court: It had been—

A. It had been vacant since February 1, 1947.

Q. By Mr. Breckenridge: It was vacant for just a month?

A. A little over a month. They left the last part of [60] January. It was vacant all of February and part of March.

Q. Did she ever tell you they would permit you to charge more than \$75 a month?

The Court: Who?

Mr. Breckenridge: Mrs. West.

(Testimony of W. E. Conrad)

The Court: She did not give any such testimony. There was no claim that subterfuge was used by either side.

Mr. Breckenridge: We claim there was.

The Court: That is what you are going to argue. Read the last question.

(Question read by the reporter.)

The Court: You will confine your answer to yes or no. A. No.

Q. By Mr. Breckenridge: Mr. Conrad, you heard Mrs. Drake testify, did you not? A. Yes.

Q. You heard her testimony in the case previous to this? A. Yes.

The Court: This is not cross-examination. You can't ask corroborative testimony of this witness.

Mr. Breckenridge: I am not trying to do so.

The Court: This is not cross-examination. I don't allow an inquiry of this character.

Q. By Mr. Breckenridge: Is it not true then that Mrs. [61] Drake is the one who said, "Mrs. West is a registered nurse," or conversation of that effect?

A. It is not. Mrs. West told me herself that she was a registered nurse. It was substantiated by Mrs. Drake. Mrs. West is the one who told me she was registered.

Q. When did she tell you that?

A. During the conversation because I wanted to be sure she would qualify.

Q. Will you say what you mean by "qualify"?

A. Acceptable.

Q. What did she tell you?

A. That she was going to run it as a very high-class rest home, a very fine home—all ambulatory patients, and that she would not take in any borderline patients.

(Testimony of W. E. Conrad)

Q. Do you know what is meant by a rest home?

A. I do. It means a home for people who are not bed patients.

Q. As stated in the provisions of the OPA, it could be used for any legal purpose whatsoever?

A. So long as it complied with the law.

Q. You state in the clause—

The Court: He has answered the question. You put it in? A. I put it in, yes.

Q. By Mr. Breckenridge: Did you at any time see any medication or treatments being given in that house? [62]

A. I brought out a hypodermic needle from the Holly View Sanitarium. What they did to that I don't know. I did not open it up. They told me it was a hypodermic needle.

Q. Who took it? A. The nurse.

The Court: You were sent there?

A. I heard some doctors were going to look at the premises, the Holly View premises. She asked me if I would stop by there when I was trying to sell the Holly View Sanitarium.

Q. By Mr. Breckenridge: Who asked you to do that?

A. Mrs. Drake.

Q. Mrs. Drake was not there?

A. I never called Mrs. Drake. I called 7462 Hollywood Boulevard. I heard some doctors were going to look at the Holly View Sanitarium.

Q. It was Mrs. Drake who told you that?

A. That's right.

(Testimony of W. E. Conrad)

Q. I understood you to say that somebody at the Holly View told you to get that.

A. The nurse at the Holly View gave it to me to take over to 7462 Hollywood Boulevard. Mrs. Drake said Mrs. West would like me to pick up the hypodermic needle, and bring it over.

Q. The nurse never asked you to? [63]

A. I said the nurse told me at the Hollywood Boulevard.

The Court: Did you ask Mrs. Drake for it?

A. Mrs. Drake apparently heard from her.

Q. By Mr. Breckenridge: You don't know what it was used for? A. No.

Q. Do you mean that anybody got medication?

The Court: He has answered that he did not know about it.

Q. By Mr. Breckenridge: Did you see any of these people?

A. Not until after she closed up and went back to Holly View.

Q. When?

A. I don't know what dates. She quit operating, I should say, as a sanitarium, in February, 1948.

Mr. Breckenridge: I object, and I will ask that be stricken out.

The Court: You are asking the question, and getting pretty far afield. I will not strike it out. He has stated it was run for that purpose. He has answered that way, so I can't strike it out.

Q. By Mr. Breckenridge: Did you use the word "sanitarium" in your negotiations? [64]

A. I asked her word to put in. She did not know what to use. I used "guest house."

(Testimony of W. E. Conrad)

Q. You say it quit operating?

A. I don't know exactly the date. It was after she got her loan. I would say it was some time in January or February, 1948.

Q. Who else, if anyone, lived in there outside of Mrs. Dempster, Miss Kline and Mrs. Emery?

A. I never took an inventory to ask the names of the patients at any time. All I have is the testimony of the patients. Some of these names I have given I got either through Mrs. West or Mrs. Drake. Otherwise I would not have known their names.

Q. You had advertised in four papers?

A. I had ads written off and on from November, 1946. I ran an ad in the Hollywood Citizen; I ran an ad in the Los Angeles Times, and the Medical Journal. I was advertising as a professional building.

The Court: Let us not go back to that.

Q. You say there was not any change in the wording of these?

A. Any real estate broker changes the ads as to real estate.

Q. All of the ads were in one, or in a series of ads?

A. They were in a series of ads. They were all advertised under business property.

Q. You did not advertise that as rental property at any time, or half of the duplex?

A. I did not. I advertised eight or seventeen rooms. They could take all or half.

(Testimony of W. E. Conrad)

Q. As a matter of fact, the ad in the Times was advertising these rooms? A. It was suitable for doctors.

Q. That is all.

Redirect Examination

By Mr. Leader:

Q. Where do you maintain your business offices?

A. At 7464 Hollywood Boulevard.

Q. That is, they are just adjacent to the subject property? A. Yes.

Q. You do not have any other office?

A. I do not.

Q. How long have you had an office there?

A. About five years.

Recross-Examination

By Mr. Breckenridge:

Q. You don't have any particular room fixed up as an office?

A. I have an alcove where the desk is, and the reception room and consultation room.

Q. Do you have furniture?

A. Yes, I have a roller top desk, where I have papers and filing cabinets, and so forth.

Q. You have a little sign there?

A. A little sign with little gilt letters, in the window, showing outside the building: W. E. Conrad, Real Estate Broker.

Q. That is all.

MELVIN BAITER,

a witness called by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, testified as follows:

The Clerk: Will you please state your name?

A. Melvin Baiter.

Direct Examination

By Mr. Breckenridge:

Q. What is your present address?

A. 6840 Whitley Terrace.

Q. You formerly resided at the premises on Hollywood Boulevard occupied by Mrs. West? A. Yes.

Q. At 7460 Hollywood Boulevard? A. Yes.

Q. When did you move in there?

A. The latter part of August, 1947. [67]

Q. What was the arrangement there?

A. I rented it. I paid a monthly rental to Mrs. West for the remaining upstairs floor.

Q. You paid so much a week?

A. I and another fellow rented it, and paid every two weeks.

Q. Do you recall what you paid?

A. \$75 a month.

Q. The two of you? A. Yes.

Q. When did you leave?

A. The best I can recall, we decided to move in April of this year.

The Court: When did you move in?

A. The latter part of August, 1947.

(Testimony of Melvin Baiter)

Q. By Mr. Breckenridge: At any time you were there, did you see any people get medical treatment?

A. No, sir, I did not.

Q. From your observation, what about the other people?

A. From my observation there wasn't anything wrong with anybody. While I was living at Mrs. West's, there was a Mrs. Emery, who was partially blind, but she got about the same as everybody else did.

Q. How was your room furnished?

A. Just ordinary bedroom furniture, like you would [68] find in a bedroom.

Q. The kind you would have in your home?

A. In your own home.

Q. Did you see any medical or physiotherapy treatment or appliances around there at any time?

A. No, sir.

Q. No hospital beds, or anything like that?

A. No, sir.

Q. This gentleman that stayed with you, is this the gentleman (indicating)? A. Yes.

Q. He stayed practically all the time you were there?

A. It so happened I was away on a vacation.

Q. Mrs. West has resided there all the time you were there? A. Yes.

Q. Did you ever see Mrs. Drake around there?

A. Yes.

Q. Did you see her get any medical attention or any care of any kind? A. No, sir.

(Testimony of Melvin Baiter)

Q. You did not see them in the kitchen?

A. Yes, she did prepare meals herself, and Mrs. Emery, if Mrs. West was not there.

Q. That is all. [69]

Cross-Examination

By Mr. Wilson:

Q. What room did you occupy?

A. The room off the stairway.

Q. Do you occupy it still? A. No.

Q. What happened?

A. I got a dog and it annoyed Mrs. Drake when I was away, and it so happened there was a young fellow living in the room adjoining, and he had to move away out of the city. We discussed the matter ourselves and said we would take the room in back. We got the dog in August. I think it was after Christmas.

Q. You moved down in November?

A. No, I think it was after Christmas.

Q. What were your facilities?

A. We had a large single room.

Q. You paid the same rent you did? A. Yes.

Q. Did you do any laundry work?

A. We did our shirts and things.

Q. That is all.

Mr. Breckenridge: Will it be stipulated that Mr. Wuertz will testify to the same?

Mr. Wilson: Yes. [70]

EDNA BAKER,

a witness called by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Breckenridge:

Q. Tell us your name, please.

A. Edna Baker.

Q. Mrs. Baker, you are acquainted with Mrs. West, the lady sitting at the table?

A. Yes, I am.

Q. Did you reside at the premises here in suit, 7462 Hollywood Boulevard?

A. Yes, I did.

Q. Would you kindly tell us what arrangements you made there?

A. I am renting a room there. I saw a sign there and it said "Furnished Rooms." I did not know until recently that was a furnished but, anyway, I went to the door and asked if they had furnished rooms and they said yes. I went upstairs and looked. The next day I phoned that I would take the room.

Q. Do you know what year?

A. This year.

Mr. Wilson: I am going to object to any further testimony on the part of this witness because it was after the [71] lawsuit.

The Court: It goes to the admissibility.

Q. By Mr. Breckenridge: You pay the rent there?

A. Yes, I do, monthly rent.

Q. Did you see any person get any medical treatment?

A. No, sir. I am gone half of the day. There is nobody around much.

(Testimony of Edna Baker)

The Court: How much rent do you pay?

A. \$25.

The Court: For what? A. For a room.

The Court: By the week or month?

A. Per month.

The Court: How large is the room?

A. Medium size. I should judge 10 by 11 or 11 by 12.

MABEL E. WEST,

recalled in rebuttal by Mr. Breckenridge, testified further as follows:

Direct Examination

By Mr. Breckenridge:

Q. Mrs. West, you heard Mr. Conrad's testimony that at the time you were out there he showed you a zoning plan. Did he do that?

A. I never saw no plan of any kind.

Q. Did you discuss the zoning regulations of the City [72] of Los Angeles for that area at all?

A. We never had no discussion.

The Court: Did you or did you not?

A. I did not.

Q. By Mr. Breckenridge: He testified to a statement that they wanted to use it for ambulatory patients, and someone paid \$500 a month for a room, is that true?

A. It is not.

Q. As to this conversation he testified to concerning the use of the premises, and using the Hollywood Sanitarium, was it discussed at all? A. No, sir.

Q. The first time you were there, how long were you there? A. Approximately a half an hour.

(Testimony of Mabel E. West)

Q. When you returned there, I believe it has been testified the next day, or the third, with Mrs. Drake, was any thing at that time said other than what you have testified to on the stand before as to the use of these premises?

A. Mrs. Drake was not there on the 3rd or 4th. Mrs. Drake was there when I looked at the place.

Q. The first time she was there?

A. That's right.

Mr. Breckenridge. I think probably, to save the time of the court, and save the time of counsel, we can probably have [73] a stipulation that she will deny these various allegations of Mr. Conrad.

The Court: She has already done so, on cross examination. For instance, she was asked by Mr. Wilson whether she denied certain instances and she denied them. Go ahead and ask the questions, if you want to.

Q. By Mr. Breckenridge: You finally employed Dr. Albert Westcott as the doctor in connection with medical services for the Holly View Sanitarium and yourself?

A. No, I never employed him. He took over the practice of Dr. Byden.

Q. He gave you treatments?

A. Yes, he was my physician, until I discharged him.

Q. When did you discharge him?

A. May, 1947.

Q. Did you give him any reason, at the time you discharged him?

Mr. Wilson: We object to that as immaterial.

The Court: Overruled.

Mr. Breckenridge: You may answer.

A. Because he was an alcoholic, and he was not capable of being a physician or taking care of a person.

(Testimony of Mabel E. West)

Q. You told him that at the time?

A. Yes, I did.

Q. You heard some testimony in regard to Mrs. Dempster [74] being out there? A. I did.

Q. When did she leave the premises on Hollywood Boulevard?

A. It was the last day of May or the first day of June, when she was taken to the Glendale Sanitarium.

Q. That was what year? A. 1947.

Q. Was there anything wrong with Mrs. Drake's physical condition? What was her physical condition?

A. I would say she was just like any elderly person. She at one time had a stroke, and was in the sanitarium, or hospital, a couple of weeks; then she was with me at the sanitarium about a year and a half. She was going back to live in a house, on account of the sanitarium where sick people were.

Q. Did you cause her to be transported or taken to the Hollywood Boulevard address?

A. No. She came over of her own free will.

Q. Who took her over?

A. Some friend, in his car.

Q. It wasn't you who engaged him? A. No.

Q. Mrs. Cline, did you take her over?

A. No, I did not. Her daughter brought her over. [75]

Q. What was their condition?

A. They were elderly ladies, and needed a place to sleep, and take care of her that way and get her meals.

Q. At that particular time it was difficult to obtain living quarters or a house?

A. That's right. You couldn't find any place. You couldn't get no place to live.

(Testimony of Mabel E. West)

Q. It has been testified that Mrs. Dempster left there around Decoration Day of June, 1947.

A. That's right.

Q. You heard Dr. Westcott testify to coming and treating her the first day of November?

A. She left the first day of June and never returned.

Q. You used the words "guest house."

A. It is just a polite way of saying rooming house.

Q. Did you suggest the word to Mr. Conrad?

A. Mr. Conrad drew up the lease and put the words in. I had nothing to do with it.

Q. In other words, this lease was typed in your absence, and prepared for signing on the 4th?

A. That's right.

Q. Did you discuss, or ask, or suggest any term or expression used in that lease, to your knowledge?

A. I did not.

Q. In other words, you signed it as he submitted it to [76] you?

A. That's right.

Q. Did he ask you to rent it—both parts of the house? Did he discuss that at any time?

A. No, sir. I couldn't pay \$1000 a month.

The Court: Was that mentioned?

A. Not at that time.

Q. By Mr. Breckenridge: When was that mentioned—\$1000 a month rent?

A. After I lived there about two months.

Q. What was the conversation?

A. I said if he could sell my lease I will be glad to get from under this. That is how it came about.

Q. You have been in the business of running a sanitarium for a number of years?

A. Yes.

(Testimony of Mabel E. West)

Q. From your experience in running a sanitarium, would you say these premises could be used for sanitarium purposes? A. They could not.

Q. Why?

A. For several reasons, especially the den in the living room. There is a round platform to go down two steps into the living room which would be impossible for a patient or anybody else. Another thing, there are only two exits, the back door and front door. [77]

Q. Did Mrs. Drake say or suggest anything about renting these premises?

A. I only knew Mrs. Drake, and she wanted to live with me, and we went to living together, and I never thought that she was going to stay with me two years. Then she told me to buy a place, and we would all be together.

Q. She did help you with the rent by paying \$100 a month?

A. She gave me a hundred dollars a month. Not any set price to help me. She was paying rent and said, "If you cannot make out," she would be glad to pay it.

Q. That is all.

Cross-Examination

By Mr. Wilson:

Q. Then you did tell Mr. Conrad you would appreciate it if he would sell your lease? A. I did.

Q. When?

A. I wouldn't know; June or July.

Q. I understood you to say that the subject of zoning was never discussed?

A. No, it was never discussed.

(Testimony of Mabel E. West)

Q. You gave your deposition on the 8th of August, 1948, in this case. I will ask if the following questions were asked, and you gave the following answers, on page 65. [78]

"Q. Do you recall a conversation with Mr. Conrad in which you inquired whether or not you could operate an ambulatory rest home in these premises in accordance with the zoning laws of this city?

"A. No.

"Q. Do you remember asking him what the zoning restrictions were?

"A. I asked him what zone it was in.

"Q. When did you ask him that?

"A. I do not recall the date.

"Q. In the early portion of your conferences?

"A. No. I didn't ask him what zone it was. He said it was in R-4."

"Q. You had some discussions about that, did you not?

"A. No.

"Q. About what R-4 meant?

"A. No."

Does that refresh your memory as to whether or not the zoning ordinance was discussed at all?

A. It wasn't discussed. He just said it was R-4. It was mentioned.

Q. You testified as I have read? A. Yes.

Q. You did not ask him?

A. No, he said it was R-4.

Q. You had some discussion about that, did you not? [79] A. No.

Q. About what R-4 meant? A. No.

(Testimony of Mabel E. West)

Q. Mrs. West, I don't know whether I understood you correctly or not, but did you testify that before you moved to the home of Mr. Conrad you were the owner and operator of the Holly View Sanitarium, before you signed this lease? A. No.

The Court: No, she did not so testify.

Mr. Breckenridge: Q. Where were you living prior to the time you rented these premises?

A. In the tin house.

Q. What is the answer?

A. I was living on the premises of the Holly View Sanitarium, in a tin house.

Q. How long had you lived on those premises?

A. Five years.

Q. That is all.

Mr. Manierre: This other witness, may it please the court, is Mrs. West's daughter. She has a small youngster and lives in Long Beach, and we are apprehensive something may have happened to the youngster, because she is supposed to know of the hearing at this time, but she came in weekends, with her one-year-old child, to visit the mother at 7462 Hollywood Boulevard, and would testify the same as Mrs. West testified.

The Court: How old is she? [80]

Mr. Manierre: Thirty. As I say, she came in weekends, and knew about the condition, and knew that a sanitarium was not being operated there, and her testimony would be that it was never furnished up as a sanitarium, with sanitarium equipment.

The Court: She would testify that she visited the place on weekends; that it was not run as a sanitarium, in that it did not have equipment of the type concerning

which you asked the other witnesses—therapy and things like that?

Mr. Manierre: There were not any patients, and that she knows what a sanitarium is.

Mr. Wilson: I don't think your Honor should permit her to state that it was not a sanitarium. That is her conclusion.

The Court: The word "sanitarium" is unimportant. It may go out. She cannot testify that it was a sanitarium. A doctor may be able to answer the question, but a lay person cannot testify.

Mr. Breckenridge: She came up there occasionally and, as far as she observed, she observed nothing other than that it was used as a rooming house.

The Court: Why don't you stipulate that when she came there she saw people, but she did not see any people being treated on the premises?

Mr. Wilson: Yes. [81]

Mr. Manierre: Mrs. Della Rush.

The Court: Will the stipulation be the same?

Mr. Manierre: Except in one respect: These roomers came and went, and we have produced all available witnesses; but the daughter knows about that, from the inception up to the date—from March, 1947, up to the date of the commencement of this action.

The Court: Counsel has offered a stipulation, that these conditions which she observed existed from the time that Mrs. West moved in, and that these witnesses will so testify.

Mr. Wilson: I will so stipulate.

Mr. Manierre: Up to the date of the commencement of the suit.

The Court: Are those all the stipulations?

Mr. Manierre: Yes.

Mr. Breckenridge: There is just one thing. Today is a holiday, and I am willing to stipulate that we have rested except for one point—

Mr. Wilson: I was going to ask one thing: If counsel can tell me what the witness is going to testify to—

The Clerk: Has counsel rested?

Mr. Wilson: He has another witness.

Mr. Manierre: No, the case is closed.

(Whereupon an adjournment was taken until 10:00 o'clock A. M., Wednesday, October 13, 1948.) [82]

* * * * *

Los Angeles, California; October 13, 1948;
10:00 O'Clock A. M.

Mr. Breckenridge: Mrs. West had some other business to take care of, and she will be a little late.

The Court: Unless counsel desires to call her back it is not necessary for her to be present.

Mr. Breckenridge: Dr. Westcott was called yesterday, and I will state that in the month of August, 1948, Dr. Albert J. Westcott was charged and found guilty of violation of Sections 2383 and others; that he was found guilty of those charges, and was advised that the license of the medical examiners was revoked. Subsequently they suspended ruling on the revocation of his license; and that he was given probation and that that record is not yet down here. It is in Sacramento.

The Court: That merely goes to his credibility.

Mr. Manierre: That is correct.

The Court: Of course, if he has been given probation, at the end of the probationary period that record would be expunged.

Mr. Wilson: I don't know anything about these matters, but if counsel says he has made that investigation I accept it.

The Court: The record may show the facts, with whatever relevancy they have to the credibility of the witness. [84]

Mr. Breckenridge: I do that to justify my position in asking those questions yesterday. I don't want the court to think I would ask the questions unless they were relevant, and the facts were as I have asked in the question. With that understanding, then, your Honor, the plaintiff rests.

The Court: Anything further you desire to present?

Mr. Wilson: No, your Honor.

The Court: I will hear any argument you gentlemen desire to present.

(Argument.)

[Endorsed]: Filed Feb. 24, 1949. Edmund L. Smith, Clerk. [85]

[Endorsed]: No. 12194. United States Court of Appeals for the Ninth Circuit. Mabel E. West, Appellant, vs. W. E. Conrad and Howard F. Conrad, Appellees. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed February 25, 1949.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12194

MABEL E. WEST,

Appellant,

v.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

POINTS ON WHICH APPELLANT INTENDS TO
RELY AND DESIGNATION OF RECORD

Comes now the appellant in the above entitled cause and makes the following statement of the points upon which she intends to rely on appeal together with a designation of all of the record which is material for the consideration of this appeal.

(1) The Trial Court erred in not finding that at the time of the making of the lease in evidence, it was the mutual intention and contemplation of the parties that the premises were to be used by the plaintiff for the purpose of plaintiff occupying said premises for housing or dwelling purposes within the scope of said term as used in the Housing and Rent Act of 1947; and in not finding that said premises and the use thereof by plaintiff were governed and controlled by the rent control acts.

(2) The Trial Court erred in concluding that it was not within the contemplation of the parties that the sub-

ject premises be leased for housing purposes as such but rather that at all times in the complaint mentioned, it was the contemplation of the parties that said premises be used for purposes of conducting a business therein.

(3) The Trial Court erred in finding that the defendant W. E. Conrad has not demanded or accepted nor received payment of rent in excess of the maximum rent prescribed under the authority of the Emergency Price Control Act of 1942 and of said Act as amended and as prescribed under the authority of the Housing and Rent Act of 1947.

(4) The Trial Court erred in concluding that the defendants had not violated the provisions of the Emergency Price Control Act of 1942 and of said Act as amended, nor the provisions of the Housing and Rent Act of 1947 or of said Act as amended, and particularly that the defendants have not violated the provisions of Section 205 of the Housing and Rent Act of 1947 or of said Act as amended.

(5) The Trial Court erred in not finding that prior to the 4th day of March, 1947 the defendant W. E. Conrad registered as a rental dwelling under the provisions of the Emergency Price Control Act of 1942 and of said Act as amended, the real property described in the lease in evidence, and in not finding that said real property is, and ever since said registration has been, registered under the provisions of the Emergency Price Control Act of 1942 and of said Act as amended and under the Housing and Rent Act of 1947 for a maximum or ceiling rent of seventy-five dollars (\$75.00) per month.

(6) The Trial Court erred in not finding that said real property is registered under said Act as housing accommodations, and that no change has ever been made in the maximum or ceiling rent of seventy-five dollars (\$75.00) per month for said real property, nor has any such change been requested or applied for by the defendants.

(7) The Trial Court erred in not finding that prior to and since the 4th day of March, 1947, the real property described in the lease in evidence was used as housing accommodations, and that during some time subsequent to the year 1942 and prior to the 4th day of March, 1947, the real property described in said lease was rented to a tenant or tenants other than plaintiff; that such tenant or tenants paid a rental not in excess of seventy-five dollars (\$75.00) per month for said real property, and that such tenant or tenants rented rooms in the dwelling house described in said lease.

(8) The findings of the Trial Court are incomplete in that such findings fail to dispose of material issues.

(9) The findings of fact and conclusions of law of the Trial Court are not supported by the evidence.

(10) The evidence is insufficient to justify the decision of the Trial Court.

(11) That apart from any presumption provided by law, the Trial Court's findings of fact and conclusions of law were clearly erroneous in the light of the stipulated evidence and the uncontradicted testimony of the witnesses.

(12) The judgment of the Trial Court is against the law.

(13) The Trial Court erred in rendering judgment in favor of the defendants and against the plaintiff.

(14) The Trial Court erred in failing to render judgment in favor of plaintiff and against the defendants as prayed.

* * * * *

MABEL E. West

Appellant

By GEORGE W. MANIERRE and
PAUL G. BRECKENRIDGE

Her Attorneys

By George W. Manierre

March 2, 1949.

[Affidavit of Service y Mail.]

[Endorsed]: Filed Mar. 3, 1949. Paul P. O'Brien,
Clerk.

No. 12194.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MABEL E. WEST,

Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

APPELLANT'S OPENING BRIEF.

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FILED
JUL 11 1934
U. S. COURT OF APPEALS
NINTH CIRCUIT
LOS ANGELES, CALIF.



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No. 12194.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MABEL E. WEST,

Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

APPELLANT'S OPENING BRIEF.

*To the Honorable, the Chief Judge and the Associate
Judges of the United States Court of Appeals for the
Ninth Circuit:*

Appellant Mabel E. West respectfully submits to the Court this her opening brief on appeal.

Jurisdiction.

This action is one instituted May 13, 1948, by appellant, Mabel E. West, the plaintiff below (hereinafter sometimes referred to as Mrs. West) against appellee W. E. Conrad, one of the defendants below (hereinafter sometimes referred to as Mr. Conrad), to recover damages in the sum of \$9,900.00, being three times the amount by which the payments made by plaintiff to said defendant within one year prior to the commencement of the action exceeded the maximum rent which said defendant could lawfully demand, accept or receive, as prescribed under the author-

ity of the Emergency Price Control Act of 1942 and of said act as amended, and as prescribed under the authority of the Housing and Rent Act of 1947, together with her reasonable attorney's fees and costs. The date of the filing of the original complaint will appear from the transcript.

The other appellee and defendant below, Howard F. Conrad, was brought in by amended complaint as a matter of course, filed May 26, 1948 [R. 9] in which amended complaint the same relief was sought. [R. 5, 6.]

It was alleged in the amended complaint (hereinafter sometimes referred to as the complaint) that the action was brought in pursuance of the provisions of Section 205 of the Housing and Rent Act of 1947, which specifically confers jurisdiction upon the District Court. [R. 2.] It is also true that jurisdiction was conferred upon the District Court under Section 205(c) of the Emergency Price Control Act of 1942 and in the amendment of 1944 (the Stabilization Extension Act of 1944). The only difference in the three acts in reference to conferring jurisdiction is in a choice of language and of the location in which it appears. The defendants made a denial of the allegation of jurisdiction [R. 10], but in the Findings of Fact proposed by counsel for defendants and adopted by the District Court, the Court found it had jurisdiction as alleged in the Complaint. [Finding I. R. 41.] Judgment on the merits was rendered in favor of the defendants. [R. 46.] This judgment was a final decision of the District Court and this Court is given jurisdiction of an appeal from it under Section 1291, Title 28, of the United States Code.

Statement of the Case.

Defendant W. E. Conrad is, and for a number of years last past has been, the legal and equitable owner of a certain double (side by side) dwelling house [R. 53] located at and known as 7462 Hollywood Boulevard (the street number of that half of said dwelling house involved in this action), in the County of Los Angeles, in a residential neighborhood quite free and quite removed from business or commercial establishments. [R. 53.] Since March, 1942, and up to February 1, 1947 [R. 91, 94], said defendant had rented the half of said double dwelling house above noted, hereinafter sometimes referred to as said premises, under a rental "ceiling" of \$75.00 per month. [R. 19-22, incl., Plaintiff's Exhibit No. 2.] The tenant immediately preceding plaintiff in possession of said premises held under a month to month tenancy of \$75.00 [R. 92], and although defendant during that time occupied the other half of said double house [R. 93] he claimed he did not know whether or not this previous tenant kept roomers. Said defendant testified "there was an OPA ceiling. Mrs. Le Grange had paid \$75.00 a month, which was frozen, and barely paid the taxes." [R. 91.] Defendant did not make any re-registration of said premises with the Office of Price Control or any rent control authorities. [R. 94.] Said defendant, apparently being dissatisfied with said "ceiling," gave the tenant preceding plaintiff in possession of said premises notice terminating her tenancy on the ground that he was "going to change the classification and lease the property as business property" and "would like to have the house as early as possible." [R. 92.] Said defendant made no changes or alterations in said premises except some minor re-decorating and repairs to plaster for the purpose of

“cleaning up and for the purpose of renting.” [R. 92, 93.] He thereupon, on or about the 4th day of March, 1947, leased said premises to plaintiff, for a term of two years at a monthly rental of \$350.00 per month; said lease was in writing and in words and figures as set forth in Plaintiff’s Exhibit 1 [R. 16 to 18, incl.], and was prepared by defendant W. E. Conrad. [R. 89; Request for Admissions (9), R. 24, and Admission (9), R. 30, and R. 97, last 2 lines.]

Plaintiff paid defendant \$700.00 on the execution of said written lease and the further sum of \$4,550.00 at the rate of \$350.00 per month from April 15, 1947, to and including the 15th day of April, 1948. [Request for Admission (17) R. 26, and Admission (17) R. 31.]

Plaintiff instituted this action to recover rental paid by her to and demanded and accepted by defendants in excess of the OPA “ceiling” of \$75.00 per month within one year preceding the filing of her complaint, amounting to \$3,300.00, and to have said amount trebled and for attorneys’ fees and costs [Plaintiff’s First Amended Complaint, R. 2 to 9, incl.]; to which defendants filed their answer [R. 10 to 15, incl.]. Plaintiff served on defendants and filed a Request for Admissions [R. 23 to 27, incl.] and defendants filed a Reply to Request for Admissions [R. 28 to 32]. The matter came on for trial before the Honorable Leon R. Yankwich on October 12-13, 1948. Thereafter said Judge signed and filed Findings of Fact and Conclusions [R. 41 to 45, incl.] and signed and filed the Judgment in said action in favor of defendants [R. 45, 46]. From that judgment the plaintiff appeals. [R. 47.]

**The Questions Involved and the Manner in Which
They Are Raised Are as Follows:**

(1) May the spirit and/or intent and express provisions of the Rental Control Acts and of the regulations issued in pursuance thereof, be abrogated and disregarded by the landlord of premises duly registered thereunder by means of a simple change in nomenclature? (Raised by the pleadings, evidence and admissions.)

(2) Where a typical single family dwelling house (one-half of double dwelling house) registered under a "ceiling" as "housing accommodations" and continuously used as such, are re-rented under a written lease expressly permitting the use thereof for any "lawful use" does the fact that the parties to said written lease intended or expected that the new tenant would rent out an unidentified number of rooms therein (admitted for purpose of argument only) in addition to residing in said premises herself, of itself "decontrol" said premises and release it and the landlord from the burdens and obligations imposed by the Rent Control Acts and the registration thereunder? (Raised by pleadings, admissions and evidence.)

(3) If in addition to the *premises and assumptions* contained in the preceding question, the assumption that the parties intended that the persons to whom the rooms might be rented were elderly people, all ambulatory, would those premises and assumptions "decontrol" said property and release it and the landlord from the burdens and obligations of the Rental Control Acts and the "registration" thereunder? (Raised by evidence appellant believes incompetent.)

(4) In what manner and to what extent can the alleged unwritten intent of the parties to the written lease be material or competent to contradict the expressed plain

unambiguous provisions of the lease, particularly when urged by the draftsman thereof? The lease prepared by defendant (a licensed real estate broker for a number of years [R. 91]) provides that the premises *may* be used, in addition to the use stated, for any "lawful purpose." He now attempts to vary and contradict this plain, unambiguous provision by having the Court find that the parties did not intend this but intended to use it for business purposes only. (See paragraphs III and IV of defendant's answer [R. 11-12], paragraph II of defendant's first affirmative defense [R. 14], and paragraphs I and II of defendant's second affirmative defense [R. 14-15].) (Raised by pleadings, admissions, evidence, findings of fact and conclusions of law.)

(5) Where property is legally registered as "housing accommodations" under the existing rental control acts, may the "registration" and registered "ceiling" be disregarded and evaded merely by notice to tenants of an inchoate plan or scheme to henceforth designate said "housing accommodations" as business property? (Raised by pleadings, evidence, findings VI and VII, conclusions of law II, III and IV.)

(6) May a landlord of registered housing accommodations disregard and evade the "registration" and the registered "ceiling" by merely inserting in a lease the phrase "to be used as a guest house or any other lawful purpose"? (Raised by pleadings, evidence, findings VI and VII, conclusions of law II, III and IV.)

(7) May a landlord who has obtained possession of premises registered as "housing accommodations" under a rent control "ceiling," by serving notice on a tenant of the termination of the tenancy on the grounds of the landlord's desire or intent henceforth to rent the premises for

business purposes (not a permitted ground for eviction under the rental control acts) be freed *ipso facto* and *eo instanti* of the burdens of the “registration” and said property thereby become “decontrolled”? (Raised by pleadings, evidence, findings VI and VII, conclusions of law II, III and IV.)

(8) May the trial court disregard the Admissions of the Pleadings and the Admissions in the Reply to Request for Admissions and the terms of the written lease? (Raised by conflict between admissions and findings VI and VII.)

(9) Assuming, without admitting, that the intent of the parties was a material issue, and further assuming without admitting that the intent was to use the premises for “business purposes,” if the business was that of furnishing “housing accommodations,” would such an intent “decontrol” said premises or remove it from the scope and effect of the Housing and Rent Control Act of 1947, or said Act as amended? (Raised by findings VI and VII and conclusions of law II, III and IV.)

(10) Is there any conflict in the evidence as to said premises being used as and for “housing accommodations”? (Raised by admissions and evidence.)

(11) Does defendants’ answer set up any legal defense to plaintiff’s cause of action, the answer consisting largely of conclusions of law? (Raised by complaint and answer.)

(12) Is Finding No. VI supported by the evidence? (Raised by transcript of evidence.)

(13) Did defendant W. E. Conrad maintain the burden of proving his affirmative defense by competent evidence? (Raised by pleadings, admissions and evidence.)

(14) Is not that portion of Finding No. VI which finds that the purpose of plaintiff occupying said premises was not "within the scope of said term as used in the Housing and Rent Act of 1947, or said Act as amended" not a proper "finding of fact" but a "conclusion of law" and as such, is not said "conclusion of law" contrary to law? (Raised by finding VI.)

(15) Is not that portion of Finding No. VII reading as follows: "The Court finds that the defendant, W. E. Conrad, has not demanded or accepted nor received payment of rent in excess of the maximum prescribed under the authority of the Emergency Price Act of 1942 and of said Act as amended and as prescribed under the authority of "Housing and Rent Act of 1947" not only not supported by but against the evidence? (Raised by evidence, admissions and finding VII.)

(16) Is not the second paragraph of Finding No. VII not a proper "finding of fact" but a "conclusion of law," and, as such, not supported by the evidence and contrary to the law? (Raised by evidence and finding VII.)

(17) Is not the Court's Conclusion of Law No. 11 against the law, immaterial, ambiguous and insufficient to support the judgment herein? (Raised by admissions and conclusion II.)

(18) Is not conclusion of law III contrary to the law and the evidence? (Raised by conclusion III.)

(19) Is not conclusion of law IV contrary to the law and the evidence? (Raised by finding IV.)

Specification of Errors.

Appellant's appeal from the judgment of the trial court is grounded more on what appellant believes to be errors of the trial court (1) in interpreting and applying the law to the facts as admitted and proved and (2) in making and arriving at its Findings of Fact and Conclusions of Law, than on specific errors in the procedure and conduct of the trial.

I.

The Court erred in receiving and considering evidence of oral statements and conversations occurring prior and subsequent to the execution of the written lease for the purpose of contradicting or varying the plain and unambiguous provisions thereof. (This alleged error is based not on an alleged breach of the law of evidence, as the transcript shows few objections to the introduction of testimony, but rather on a rule of substantive law, as will be pointed out in our "Argument.")

II.

The Court erred in concluding that defendant W. E. Conrad and the dwelling house registered by him (as landlord) as "housing accommodations" under the Rental Control Acts, were released from the burdens and restrictions imposed by such "registration" and Rental Control Acts.

III.

The Court erred in concluding that because he found that the parties intended to use said premises for business

purposes (even though such alleged business purposes necessarily consisted primarily of using the premises for “housing accommodations”) that the Rental Control Acts did not apply.

IV.

The Court erred in finding in substance that defendant W. E. Conrad, without any change or evidence of any requested change in “registration” or rental “ceiling,” and without any change or alteration in the physical characteristics of the property, could, by the “legal legerdemain” of leasing the dwelling house as a “guest house” (which term itself necessarily involves “housing accommodations”) or any other “lawful purpose,” could change said property from “housing accommodations” registered under a ceiling of \$75.00 per month to business property at \$350.00 per month.

V.

The Court erred in not finding that the premises were used by plaintiff for “housing accommodations” as defined in the Rental Control Acts and Regulations.

VI.

The Court erred in finding that the purpose of plaintiff occupying said premises was “not for the purpose of plaintiff occupying said premises for housing or dwelling purposes within the scope of said term as used in the Housing and Rent Act of 1947 or said Act as amended.” This is not a proper finding of fact but a conclusion of law, and as such it is contrary to the law. [Finding VI, R. 43.]

VII.

The Court erred in its Finding VII [R. 43] reading as follows:

“The Court finds that the defendant W. E. Conrad has not demanded or accepted nor received payment of rent in excess of the maximum rent prescribed under the authority of the Emergency Price Control Act of 1942 and of said Act as amended, and as prescribed under the authority of the Housing and Rent Act of 1947.”

This finding is not only not supported by but is against the evidence.

VIII.

The Court erred in the second paragraph of its Finding VII. [R. 43.] This is not a proper finding of fact, but a conclusion of law, and as such is not supported by the evidence and is contrary to the law.

IX.

The Court erred in its conclusion of law II. [R. 44.] This conclusion is against the law, immaterial, ambiguous, and insufficient to support the judgment herein.

X.

The Court erred in its conclusion of law III. [R. 44.] This conclusion is contrary to the law and the evidence.

XI.

The Court erred in its conclusion of law IV. [R. 44.] This conclusion is contrary to the law and the evidence.

Summary of the Argument.

The argument presented herein by appellant largely concerns itself with certain errors of law, particularly in the trial court's interpretation and application of the provisions of regulations issued under, and of the provisions of, the Rent Control Acts. However, there are several alleged specific errors noted, and appellant believes them to be substantial. One is to the effect that the very considerable body of parol evidence in the form of conversations, circumstances, and self-serving declarations introduced in an attempt to show the "purpose" or "use" intended or permitted by the written lease to be other than provided by its express terms, is not, by force of substantive law, and should not be considered as being, entitled to any probative value or as being any evidence of the matters attempted to be proved thereby. Argument as to this and other alleged specific errors, such as alleged in connection with the "findings" and "conclusions" is separately addressed to each such respective specification of error.

The main body of the argument attempts to follow the order and theory of the other specifications of alleged errors, particularly as to the effect and application to the facts herein of the Rent Control Acts, Regulations, rulings and Court decisions.

ARGUMENT.

As to Alleged Error I.

Much stress was put by the defendants upon the negotiations leading up to the making of the lease. Mr. Conrad testified that he had been in the real estate business since 1918 and had prepared the lease himself [R. 91, 89], particularly the clause descriptive of the purpose for which the dwelling house was to be used, viz., as a guest house or any other lawful purpose. [R. 97; and lease, Plaintiff's Exhibit 1, R. 16-18.]

There was in direct conflict with his sworn reply to plaintiff's request for admissions, in which he said that he "incorporated therein the demands of plaintiff that the subject premises be referred to and classified and designated as a 'guest home.' " [Admission (9), R. 30.] The lease having been executed, any testimony as to the prior negotiations was, of course, incompetent.

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Civil Code of California, Sec. 1625.

Nevertheless, the Court permitted the testimony to go in, including evidence tending to show that Mrs. West intended to operate a sanitarium. "She owned the Holly View Sanitarium and was going to take the house for ambulatory patients." [R. 87.]

It would seem, in the light of the adjudicated cases, that appellees cannot be heard to complain of any lawful use to which the dwelling house was to be put, or, for that matter, that it was put to some lawful use other than that discussed in the negotiations.

Certainly the language "as a guest house or any other lawful purpose" is so plain that "he who runs may read." We are not driven to a consideration of the law governing the construction of a written document. As to the construction to be placed upon this language as between landlord and tenant the best expression which we have been able to find is that of Judge Shaw in *Davidson v. Goldstein*, 136 P. 2d 665 (Appellate Department, Superior Court of Los Angeles County, April 16, 1943), in which he said (p. 666):

"The lease contains no limitation of the uses to which the lessee may put the leased property. In the absence of such limitation, the tenant may use the property for any lawful purpose not materially different from that in which they are usually employed, to which they are adapted or for which they were constructed. 36 Cor. Jur. 84, 87; *Keating v. Preston*, 1940, 42 Cal. App. 2d 110, 115, 108 P. 2d 479. The fact that before the written lease was entered into the parties discussed defendant's use of the building, and defendant said he wanted to lease it to engage in the tire business and would engage in that and the battery business, does not limit his use to those purposes. The conversation does not purport to have that effect, and even if it did, it could not be given such effect against the written lease containing no such limitation. Section 1625, Civil Code; section 1856, Code of Civil Procedure; *Gibbs v. Seeger*, 1933, 130 Cal. App. 123, 128, 19 P. 2d 514."

As to the parol evidence rule we invite the Court's attention to the language used by the Supreme Court of California in *In re Gaines' Estate*, 15 Cal. 2d 255, 100 P. 2d 1055 at 1060:

"The parol evidence rule, as is now universally recognized, is not a rule of evidence but is one of substantive law. It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), becomes the contract of the parties. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes said, the written memorial supersedes these prior or contemporaneous negotiations. See *Civ. Code*, sec. 1625; *Code Civ. Proc.*, sec. 1856; *Harding v. Robinson*, 175 Cal. 534, 166 P. 808; *Rottmann v. Hevener*, 54 Cal. App. 474, 202 P. 329; *Estes v. Delpech*, 73 Cal. App. 643, 238 P. 1085; *Hanrahan-Wilcox Corp. v. Jenison Machinery Co.*, 23 Cal. App. 2d 642, 73 P. 2d 1241; 5 *Wigmore, Evidence*, sec. 2400, p. 236; 3 *Williston, Contracts*, sec. 631; *Restatement, Contracts*, secs. 237-244."

As to Alleged Error II.

Mrs. West testified that the house in question was an ordinary two-story 8-room house [R. 52; see also the Registration Statement, Plaintiff's Exhibit 2, R. 19] and that it could not have been used for a sanitarium "for several reasons, especially the den in the living room. There is a round platform to go down two steps into the living room which would be impossible for a patient or anybody else. Another thing, there are only two exits, the back door and front door" [R. 108]; that she never applied for a license to conduct any business there [R. 66]; that it was in a residence neighborhood and that there were no store buildings, commercial buildings, or office buildings on Hollywood Boulevard within a mile between La Brea and Rubio. [R. 53.]

This testimony was not denied.

It was obviously the opinion of the trial judge that renting a few rooms in an ordinary 8-room dwelling house was the operation of a commercial business as distinguished from providing housing accommodations. This is evidenced by the Findings VI and VII [R. 43] and the Conclusions II and III [R. 44], and this in the face of the law and regulations from the effect of which we are constrained to believe the defendants cannot escape.

Rent control had its inception in the Emergency Price Control Act of 1942. This was followed by the Amendment of 1944 (The Stabilization Extension Act of 1944, Public Law 383, 78th Congress, 1944, United States Congressional Service, p. 616) and the Price Control Extension Act of 1946 (Public Law 548, 79th Congress, 1946, United States Code, Congressional Service 632 at 644) and the Housing and Rent Act of 1947. These Acts supplement each other and the provisions thereof, includ-

ing the regulations issued under these Acts, each containing substantially the same terms. For convenience we have added to this brief an appendix A, being a résumé of pertinent Acts of Congress and rent control regulations and it is thought that we do not have to look far beyond these Acts and regulations for the law applicable to the instant case.

Under the Emergency Price Control Act of 1942, Section 2 (g), it was provided that "regulations, orders and requirements under this act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof"; and under Section 201 (a) that "the Administrator may from time to time issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act." This latter provision was carried into Section 201 (d) of the Amendment of 1944 and the authority of the Administrator and subsequently of the Housing Expediter, under the Housing and Rent Control Act of 1947, Section 204 (d), to issue regulations and to enforce compliance therewith has never been questioned.

Under Section 205 (e) of the Emergency Price Control Act a tenant was given the right to "bring an action either for \$50.00 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs, as determined by the Court."

The language of Section 205 (e) was modified by the Amendment of 1944 which added the so-called "Chandler Defense" provisions to read as follows:

"In such action the Seller" (in this case the lessor)
"shall be liable for reasonable attorney's fees and

costs, as determined by the Court, plus whichever of the following sums is the greater: (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based, as the Court in its discretion may determine, or (2) an amount not less than \$25.00 or more than \$50.00, as the Court in its discretion may determine; *provided, however, that such amount shall be the amount of the overcharge or overcharges, or \$25.00, whichever is greater, if the defendant proves that the violation of the regulation, order or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*" (The so-called Chandler Defense is italicized.)

Under the Price Control Extension Act of 1946 the second sentence of Section 205 (e) of the Emergency Price Control Act of 1942 was amended to read:

"In any action under this subsection the Seller shall be liable for reasonable attorneys' fees and costs as determined by the Court, plus whichever of the following sums is greater (1): Such amount not more than three times the amount of the overcharge or the overcharges upon which the action is based, as the Court in its discretion may determine, or (2) an amount not less than \$25.00 or more than \$50.00, as the Court in its discretion may determine; *provided, however, that such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order or price schedule was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*" (The so-called "Chandler Defense," as modified, is italicized.)

Section 205 of the Housing and Rent Act of 1947 materially modified the provisions of the preceding Sections 205 so as to read as follows:

“Any person who demands, accepts or receives any payment of rent in excess of the maximum rent prescribed under Section 204 shall be liable to the person from whom he demands, accepts or receives such payment, for reasonable attorney’s fees and costs, as determined by the Court, plus liquidated damages in the amount of (1) \$50.00 or (2) three times the amount by which the payment or payments demanded, accepted or received exceeded the maximum rent which could be lawfully demanded, accepted or received, whichever in either case may be the greater amount: *provided that the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*” (The further modified Chandler Defense is italicized.)

It will thus be seen that the policy of the Congress to protect the tenant was expanded in each of the amendments to the original Act, and while in the Act of 1947 the modified Chandler Defense was substantially retained, the Court was nevertheless divested of jurisdiction to exercise its discretion to award less than treble damages unless the “Chandler Defense” was proven.

In pursuance of the authority vested in him the Administrator in the first instance issued his Rent Regulation for Housing under which it was required that the landlord file a registration statement; that this statement was filed is not only proven but admitted. [Plaintiff’s Exhibit 2, R. 19; Request for Admission (1), R. 23, and

Admission (1), R. 29.] This registration provided for a maximum monthly rental of the rental dwelling in question of \$75.00 per month and it is admitted that no re-registration of the property was made. [Stipulation of Counsel, R. 94.] The regulation Section 1388.984 fixed the maximum rent of this rental dwelling as the rent on either May 1, 1942, or the first rent for such accommodation after March 1, 1942, and it will be noted from the registration statement [R. 19] that the maximum rent date for the dwelling in question was March 1, 1942, the effective date of the registration being November 1, 1942.

The Administrator issued his Rent Regulation for Housing under date of October 15, 1946, effective October 16, 1946, and this was the regulation which was in effect on March 4, 1947, when the lease in question was made. Section 2 of this regulation contains a prohibition against higher than maximum rents "regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into."

Section 4 of this regulation reads as follows:

"Maximum rents. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be: * * * (i) Rent established under former sections 5(e). For housing accommodations with a maximum rent established, prior to March 1, 1943, under the first paragraph of section 5(e) as that paragraph appeared in Maximum Rent Regulations issued prior to such date, the rent on March 1, 1943, or if the accommodations were not rented on that date, the last rent prior thereto, but in no event more than the maximum rent established under such first paragraph of section 5(e). The Administrator may order a decrease in the maximum rent as provided in section 5(c)(8)."

This regulation has always been held to mean that maximum rents, once fixed, can be increased only by an order of the Administrator and the language of the regulation is so plain and unambiguous that there can be no doubt of the construction to be placed upon it. The situation is one frequently encountered where the principle involved is so elementary that decisions of the courts are difficult to find. Our search for citations and inquiry of the Rent Control authorities discloses but one applicable decision, that of the Appellate Department of the Superior Court of Los Angeles County in *Baur Properties Inc. v. Aaron Schwartz*, Superior Court No. Civ. A 6623, Trial Court No. 820772. In a Memorandum Opinion Judge Shaw, held this language to mean that "maximum rents once fixed can be increased only by an order of the Administrator (or Rent Director) made on petition of the landlord." In view of the fact that this decision does not appear in the published reports, we have added a copy of it to this brief as Appendix B. This, we take it, is in compliance with Rule 20(f).

Subsection (a) of Section 5 of this regulation provides that any landlord may file a petition for adjustment to increase the maximum rent only on the principal ground that "(1) There has been on and after the effective date of registration a substantial change in the housing accommodations by a major capital improvement, as distinguished from ordinary repair, replacement and maintenance." It is admitted that the appellees filed no such petition and it would seem from the language of the regulation to have been incumbent upon them to have proved their authority to increase the rent from the maximum of \$75.00 per month, fixed under the regulation, to the amount of \$350.00 per month, as specified in the lease. It was ad-

mitted that \$350 per month had been demanded and accepted. (Request for admissions (17) [R. 26] and admission (17) [R. 31].)

That the appellees can take no benefit from the "Chandler Defense" is at once apparent from the record, where we find that after April 15, 1948, when Mrs. West "desisted from paying \$350.00 per month" the defendant asked of her "\$350.00 a month" [Stipulation of Counsel R. 55] and that Mr. Conrad refused to accept Mrs. West's tenders of the legal rent of \$75.00 per month. [Stipulation of Counsel R. 69.] These tenders were returned without comment. [Testimony of Mrs. West R. 70.]

As to Alleged Error III.

The appellees also laid great emphasis upon the proposition that Mrs. West "was going to take the house for ambulatory patients" [testimony of Mr. Conrad R. 87] and to "bring in her clientele of ambulatory patients" [*Idem* R. 89]; "She was going to run it as a very high class rest home, a very fine home, all ambulatory patients, and that she would not take in any border line patients." [*Idem* R. 95.] These were all self serving declarations. Note the attempt to apply some sinister meaning to the adjective "ambulatory," which in its common acceptance and according to Webster means simply "Of or pert. to walking; having the faculty of walking; formed or fitted for walking, as an ambulatory animal." Mrs. West's roomers consisted, from time to time, of a few elderly ladies, a lady and her daughter, and two young men, all of whom could take care of themselves and were naturally "ambulatory."

But whether Mrs. West expressed herself as appellees would have us believe, is of little, if any importance in discussing the legal situation. The evidence was entirely to the effect that the house was to be used for dwelling and housing purposes, and even the testimony of Mr. Conrad and the other witnesses of the appellees was to the same effect, viz., that the dwelling was to be and actually was used for living and dwelling purposes, or, in other words, as housing accommodations within the purview of the Acts of Congress and the regulations. The Trial Court in this situation could not properly find and conclude that the premises were to be used for purposes of conducting a business therein and not for housing or dwelling purposes.

Under the regulation, Section 1, which exempted certain other housing, paragraph (4) provided "that this regulation *does* apply to entire structures or premises wherein 25 or less rooms are rented or offered for rent by any lessee, sub-lessee, or other tenant of such entire structure or premises, whether or not used by the lessee, sub-lessee or other tenant as a hotel or rooming house." How then, in the face of this regulation, can it be contended that the operation of a rooming house of less than 25 rooms could be treated as a commercial business, exempting the dwelling from rent control? The Administrator was given very broad powers under the Price Control Acts to make regulations, and, as the courts have repeatedly held, to make interpretations of such regulations. It is interesting to note, therefore, that the Administrator, as far back as August 15, 1942, interpreted the exemption of hospitals as not to include sanatoriums.

Section 1(b) of Standard Rent Regulations for Hotels, Rooming Houses and Motor Courts provided:

“This regulation does not apply to the following:

* * *

“(3) *Charitable or educational institutions.* Rooms in hospitals, or rooms of charitable or educational institutions used in carrying out their charitable or educational purposes.”

The following is the Administrator's interpretation as to exemption of hospitals. Section 13(a)(6)—Interpretation 1(b)(3) August 15, 1942:

“HOSPITALS; EXEMPTION.—T operates a large building, containing 130 rooms which are rented on a daily and weekly basis. The establishment is described and generally known as a sanatorium and is used by persons seeking rest and general care, rather than medical care. Two resident physicians are in attendance, but there are no operating rooms. Nursing services are supplied to clients of the establishment on request, but in most instances the clients either require no nursing services or supply their own personal attendants.

“The establishment is not a ‘hospital’ within the provision of Section 1(b)(3) of the Hotel and Rooming House Regulation exempting ‘rooms in hospitals’ from the regulation. The term ‘hospital’ is to be understood in accordance with the meaning employed in common usage. Generally speaking, for an establishment to constitute a ‘hospital’ it should appear that (1) the establishment provides beds for persons who are ill or otherwise in need of medical care; (2) that it is so equipped and operated that medical care is available to the patients, either from

physicians on its staff or from private physicians who are authorized to give such services within the establishment; and (3) nursing services are provided. The primary function of the establishment should be to furnish facilities for those in need of medical care."

The foregoing is from Rent Regulations as appearing in the Commerce Clearing House Service and is a copy of the O. P. A. Interpretations 1 (b) 3 of Hotel Regulations, O. P. A. Service page 200:2541.

This interpretation has never been modified or rescinded.

This Court in *Bowles v. Wheeler*, 152 F. 2d 34, has said that such an interpretation of the regulations is entitled to great weight and serious consideration. This Court said (pp. 37, 38):

"(2) With respect to the regulations issued pursuant to the broad powers granted the Price Administrator to issue 'such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of the Act' (section 201 (d)) we find conclusive evidence of the clear intent of Congress to make anti-inflation controls as effective as legislative ingenuity could devise. We are specifically forbidden by the Act to 'consider' the validity and legality of the regulations (section 204(d)). *Yakus v. United States*, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834; *Bowles v. Willingham*, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892; *Rosensweig v. United States*, 9 Cir., 144 F. 2d 30; *Bowles v. Nu Way Laundry*, 10 Cir., 144 F. 2d 741, 746, certiorari denied 323 U. S. 791, 65 S. Ct. 431. It is, of course, the province and the duty of the court to determine for itself whether a defendant is within the coverage of the Act or regulation, but in the determination of that ques-

tion it is not competent for the court to consider the fairness or equity of any regulation or price schedule established thereby. Such consideration is reserved for the Emergency Court. *Bowles v. Nu Way Laundry, supra.* * * * His interpretation of the Act and the applicability of the regulations issued under authority of the Act are entitled to great weight and serious consideration. Also where the regulations purport to apply, the issue of applicability of the Act is a question for the Emergency Court only. See *United States v. Pepper Bros.*, 3 Cir., 142 F. 2d 340, 343; *Bowles v. Cullen*, 2 Cir., 148 F. 2d 621; *Bowles v. American Brewery, supra*; *Bowles v. Texas Liquor Board*, 5 Cir., 148 F. 2d 265."

In the footnote to this Court's opinion appear several other citations showing a complete unanimity of opinion of the Federal Courts. To these citations we make brief reference.

In *Consolidated Water Power & Paper Co. v. Bowles*, 146 F. 2d 492, the Emergency Court of Appeals said (p. 494):

"In any case of ambiguity in a regulation established by an administrative officer, his interpretation is entitled to great weight. Where reasonable, it well may be controlling."

In *Bowles v. Nu-Way Laundry Co.*, 144 F. 2d 741, 746, the Tenth Circuit announced the rule as follows:

"Since the Administrator is empowered to fix and establish prices by promulgation and adoption of appropriate regulations he is also authorized to interpret such regulations for the guidance of those amenable to the Act and regulations, and such interpreta-

tions, if not controlling, are entitled to great weight so long as they do not distort or pervert the plain intendment of the Act. Cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 325, 53 S. Ct. 350, 77 L. Ed. 796."

In *Goodman v. Bowles*, 138 F. 2d 917, 919, the Emergency Court of Appeals has said:

"This interpretation by the Administrator of his own regulation, which interpretation was made before any action was taken on the present complainants' petition for adjustment, is entitled to persuasive weight."

In *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, in affirming an order of the Federal Communications Commission, prescribing a uniform system of accounts for telephone companies, Mr. Justice Cardozo, speaking for a unanimous court, went so far as to say (p. 236):

"This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct Accounting'." (Emphasis supplied.)

In *Walling v. Cohen*, 140 F. 2d 453, the Third Circuit, in passing upon an interpretative ruling of the Administrator of the Wage and Hour Division of the Department of Labor, said (pp. 455, 456):

“In passing upon the intent and scope of the orders, it is to be borne in mind that the interpretive rulings of the Administrator are entitled to great weight.”

* * * “And, as the competently promulgated orders of the Administrator have the force and effect of legislative enactments, by the same token, such orders are also to be liberally construed. *Ralph Knight, Inc. v. Mantel*, 8 Cir., 135 F. 2d 514, 517.”

* * * “When, therefore, the Administrator has placed an interpretation upon his order as being intended to include the manufacture of certain articles, it could be only where his interpretation is capricious and arbitrary that a court would be warranted in interfering with the order by placing a different construction upon it. The instant case affords no basis for such action. There is no evidence that the classification did not bear a reasonable relation to the objectives to be attained. See *Columbus & G. Ry. Co. v. Administrator*, 5 Cir., 126 F. 2d 136, 139.”

A case of considerably more than passing interest in construing the rent regulation is *Lovett v. Bell*, Supreme Court of California, 30 Cal. 2d 8, 180 P. 2d 335. In that case, an unlawful detainer action, brought after the expiration of a lease, the defendants had gone into possession of a motor hotel, an entire structure containing 12

units and owned by plaintiffs, under a written lease covering a five year period ending September 30, 1945. Defendants occupied two units as living accommodations. On May 3, 1944, a written modification of the lease was executed, by the terms of which plaintiffs relinquished "their right to sell said premises free and clear of said lease prior to the expiration" thereof and defendants relinquished an option they had to renew the lease and "any interest in said leased premises above described after the 30th day of September, 1945." On September 25, 1945, the defendants tendered the monthly rent "for the calendar month October 1945." Plaintiffs promptly returned the check and on October 11, 1945, without complying with the provisions of the rent regulation, filed their complaint for unlawful detainer. From a judgment for plaintiffs defendants appealed. The Court said:

"Among other purposes, the act as a war measure was designed to 'eliminate and prevent . . . disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; . . . ' (50 U. S. C. A., App., §901.) Section 2(g) of the act provides that 'regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.' (50 U. S. C. A., App. §902(g).) In line with this expression of policy, section 1(d) of the Rent Regulation declares that 'an agreement by the tenant to waive the benefit of any provision of this regulation is void.' Such prohibition recognizes the

restricted supply of housing accommodations available during the designated period of national emergency and protects the tenants from the enforcement of exactions obtain by the landlord at variance with the rent control program.” * * *

“The Rent Regulation defines ‘housing accommodations’ to mean ‘any building, structure, or part thereof . . . rented or offered for rent for living or dwelling purposes.’ (§13(a)(6).) It also defines ‘landlord’ to include ‘an owner . . . or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations’; and it defines ‘tenant’ to include any person ‘entitled to the possession or to the use or occupancy of any housing accommodations.’ (§13(a)(8) and (9).) The chief consideration under these definitions seems to be the character of the initial occupancy of the property as housing accommodation.” * * *

“Nor is it of any significance in the cited cases that the dispossession attempt was made with respect to a single family dwelling while here defendants use but two of the twelve units for their own housing accommodations and the balance of the motel is rented for business purposes. The Rent Regulation for Housing applies to ‘entire structures or premises wherein 25 or less rooms are rented or offered for rent by any lessee, sublessee or other tenant of such entire structure or premises, whether or not used by the lessee, sublessee or other tenant as a hotel or rooming house.”

As to Alleged Error IV.

Mr. Conrad testified that he gave a previous tenant notice in January, 1946 that "I was going to change the classification and lease the property as business property" [R. 92] and that he made some unimportant repairs to the house [R. 92, 93], (not to be distinguished from ordinary repair, replacement and maintenance within the purview of the applicable regulation).

Subsection (a) of Section 5 of the Rent Regulation for Housing effective October 16, 1946, provided that

"(a) *Grounds for increase of maximum rent.* Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable only on the grounds that:

(1) *Major capital improvement after effective date.* There has been on or after the effective date of regulation a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance. * * *

Within a month after the old tenant moved out, he rented the dwelling house to Mrs. West at \$275.00 a month in excess of the maximum lawful rent established by the Rent Control authorities, for, under Section 4 of the regulation, maximum rents could not be increased unless and until changed by the administrator as therein pro-

vided. The applicable section (repeated here for convenience) reads as follows:

"Sec. 4. MAXIMUM RENTS. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be: * * *

"(i) *Rent established under former section 5(e).* For housing accommodations with a maximum rent established, prior to March 1, 1943, under the first paragraph of section 5(e) as that paragraph appeared in Maximum Rent Regulations issued prior to such date, the rent on March 1, 1943, or, if the accommodations were not rented on that date, the last rent prior thereto, but in no event more than the maximum rent established under such first paragraph of section 5(e). The Administrator may order a decrease in the maximum rent as provided in section 5(c)(8)."

In the face of the admitted facts and of the applicable rent regulation, the Court concluded:

"III.

That the defendants have not violated the provisions of the Emergency Price Control Act of 1942, and of said Act as amended, nor the provisions of the Housing and Rent Act of 1947, or of said Act as amended, and particularly that the defendants have not violated the provisions of Section 205 of the Housing and Rent Act of 1947, or of said Act as amended." [R. 44.]

As to Alleged Error V.

At the time Mrs. West approached Mr. Conrad to lease the dwelling house, she was in very poor health and had had a breakdown; she was looking for a place to live; "The only thing was if we could rent out other rooms, other bedrooms." [R. 67.] Otherwise she could not afford it. [R. 58-68.]

As to the use to which the house was to be put Mrs. West testified "Mrs. Drake moved in with me," and "she took care of her own room" [R. 54]; "The old lady, Mrs. Drake, was to live with me in the house. She was to share it." [R. 60.] "She was an old lady and had her own property." [R. 61.] There wasn't anything physically wrong with Mrs. Drake at the time. "She was just like any elderly person. She at one time had a stroke, and was in the sanitarium, or hospital, a couple of weeks; then she was with me at the Sanitarium about a year and a half. She was going back to live in a house, on account of the sanitarium where sick people were." [R. 106.]

Mrs. Drake (obviously a witness hostile to Mrs. West), testified, "Mrs. West was looking for another location and home and I was looking for a place where I could rest and be free from the cares of my household." [R. 79.] Mrs. Drake had some furniture. "I had used from five or six rooms; about six rooms, half oriental rugs * * * I took them over. The oriental rugs, in the rest home." [R. 83.] Her furniture was not just in the living room downstairs. "It was all around the house." Mrs. West bought other furniture on Main Street. [R. 85.]

Melvin Baiter testified that he "and another fellow" rented a room from Mrs. West from August, 1947 to April, 1948. [R. 100.] He saw no people get medical treatment. "From my observation there wasn't anything

wrong with anybody * * * There was a Mrs. Emery, who was partially blind, but she got around about the same as everybody else did." His room was furnished with "just ordinary bedroom furniture, like you would find in a bedroom," the kind you would have in your own home. He saw no medical or physio-therapy treatments or appliances at any time and no hospital beds or anything like that. He saw Mrs. Drake there, but did not see her get any medical attention or any care of any kind. [R. 101.]

It was stipulated that Mr. Baiter's roommate, Mr. Wuertz, would testify to the same effect.

Mrs. Edna Baker roomed with Mrs. West at the time of the trial. She did not see any person get any medical treatment. [R. 103.]

It was stipulated that Mrs. West's daughter, Mrs. Della Rush "would testify that she visited the place on week-ends; that it was not run as a sanitarium, in that it did not have equipment of the type concerning which "other witnesses have been asked, therapy and things like that." "She came there and saw people but she did not see any people being treated on the premises." "These roomers came and went * * * but the daughter knows all about that from the inception * * * from March, 1947 up to the date of the commencement of this action" and "that these conditions which she observed existed from the time Mrs. West moved in." [R. 110, 111.]

The foregoing is a statement of the undisputed facts in evidence, and the preponderance of the evidence proves the dwelling house was never operated as a sanitarium.

The fact remains undisputed that Mrs. West set out to take roomers (albeit some of them elderly) so that she might afford a home for herself and the record discloses that that is exactly what she did.

VI.

This Court Is Not Required to Accept Findings Unsupported by the Evidence and May Go Behind Discretion to Apply the Correct Rule of Law.

It is our contention that there is no conflict in the relevant and material evidence and that the trial court was led astray upon matters purely immaterial to a decision upon the main issue, viz., whether the dwelling house was to be and was used by appellant as "housing accommodations." In this situation it would seem that the burden is upon this Court to scrutinize the record and determine whether the trial court has applied the correct rule of law to the admitted facts. This requires looking beyond the findings of fact to the matters admitted, by which the trial court was bound.

Federal Rule 52 does not require this Court to accept fact findings unsupported by the evidence or conclusions of law which do not rest properly on the facts found. It was said in *Campana Corporation v. Harrison* (7th Circuit), 114 F. 2d 400 at 405:

"In the application of Federal Rule 52 it is the following principle that guides this Court: the reviewing court does not review the evidence as an original fact finding tribunal: it does not attempt to settle conflicts in evidence or to determine questions of credibility. In *re Duvall*, 7 Cir., 103 F. 2d 653, 655; *Guilford Const. Co. v. Biggs*, 4 Cir., 102 F. 2d 46, 47. Of course Federal Rule 52 does not require us to accept fact findings unsupported by the evidence. Nor does this Rule require us to respect conclusions of law which do not rest properly on the facts so found. It is certain that the principle giving the above described weight to the trial court's findings of fact, does not compel the reviewing court to give any

specific weight to the trial court's conclusions of law, as it yet remains the duty of the appellate court to decide whether the correct rule of law has been applied to the facts found."

"An appellate court may go behind discretion to ascertain correct legal standards."

In re Central R. of New Jersey, 163 F. 2d 44 at 49.

In construing a contract the Sixth Circuit said:

"Much reliance is placed by the appellee upon so-called findings of fact by the district judge. But the problem here presented involves the interpretation of a written contract. * * * In construing the contract we are confronted with a legal question within the competence of this court to decide."

Crosley Radio Corporation v. Dart, 160 F. 2d 426 at 431.

While it is not the province of this Court to review the discretion of the trial court, if exercised within legal bounds, it is the right and duty of this court "to determine whether in the exercise of the discretion committed to it, the trial court applied the correct legal standards."

Bratt v. Western Air Lines, 155 F. 2d 850 at 853.

If the ultimate finding is contrary to the evidentiary findings or is based upon a misapplication of the law to the evidentiary findings it is not binding on this Court.

United States v. Armature Rewinding Co., 124 F. 2d 589 and 591.

Where a judgment is against the undisputed evidence of the case, it cannot be upheld on appeal.

Grigsby v. Davey, 207 Cal. 181, 277 Pac. 330 at 331.

As to Alleged Errors VII, VIII, IX, X and XI.

The finding VII "That the defendant W. E. Conrad has not demanded or accepted nor received payment in excess of the maximum rent prescribed under the authority of the Emergency Price Control Act of 1942 and of said Act as amended and as prescribed by the authority of the Housing and Rent Act of 1947" is not only not supported by, but is against the evidence.

This finding was predicated upon the Court's previous findings and the proposition is elementary that an alleged finding of fact cannot be regarded as such where it appears that it is a conclusion drawn from the facts previously found.

It will be remembered that the dwelling house had been registered with a maximum rent or ceiling of \$75.00 per month. [Pltf. Ex. No. 2.] Mr. Conrad testified that he had made no re-registration of the property, which fact was also stipulated by his counsel. [R. 94.] The defendants admitted that the property had been so registered as a rental dwelling [Admission (1), R. 23-29] and admitted that they had collected from Mrs. West the sum of \$700.00 for the first and last months of the term of the lease, and "the sum of \$350.00 on or about the 15th day of each and every month following the 15th day of March, 1947 to and including the 15th day of April, 1948." [Admissions (17), R. 26, 31.]

Further comment upon this erroneous finding of the Court seems to be unnecessary.

We have said in our specification of errors that the conclusion of law II [R. 44] "is against the law, immaterial, ambiguous and insufficient to support the judgment herein," and have argued above that, the dwelling house having been leased "as a guest house or any other lawful

purpose," it is quite immaterial as to the use to which the house was put so long as that use was legitimate. In spite of the facts as admitted, the Rent Control Acts and the regulations issued thereunder, the lower court has assumed to conclude that "it was the contemplation of the parties that the subject premises be used for purposes of conducting a business therein."

Now, for what business purpose, if you please, was the house to be used? The Housing Regulation exempts "farm tenants," service employees, "rooms or other housing accommodations within hotels or rooming houses or housing accommodations which have been, with the consent of the Administrator, brought under the control of the Rent Regulation for hotels and rooming houses pursuant to the provisions of that regulation"; "structures in which more than 25 rooms are rented or offered for rent"; "housing accommodations rented to the United States acting by the National Housing Agency"; "Summer Resort housing"; "Winter Resort housing."

Rent Regulation for housing effective October 16, 1946, Section 1, Subsections (1), (2), (3), (4), (5) and (6).

Certainly the dwelling house in question did not fall under any of these classifications, and we do not believe that it can seriously be contended that it was, or was intended to be, used except as housing accommodations. Even if it be contended that renting a few rooms in a small dwelling house is "conducting a business therein," the fact remains that such an activity would not remove the dwelling house from the restriction of the regulation, nor change its character as a housing accommodation. For our part, we are constrained to believe that the highest use to which the dwelling could be put as a housing ac-

commodation would be to provide living quarters for as many roomers as the capacity of the little house would permit.

And it will be noted that the regulation just cited (Subsection (4)) specifically provided "This regulation *does* apply to entire structures or premises wherein 25 or less rooms are rented or offered for rent," etc., and the dwelling house in question definitely falls within this category.

In the light of what we have said, the Court's Conclusion III [R. 44] is equally vulnerable, and it seems unnecessary to argue that Finding VII [R. 43] is peculiarly susceptible to successful attack.

If we are correct in our criticism of the Court's findings and of his other conclusions, it necessarily follows that, the Conclusion IV [R. 44] that "the plaintiff is entitled to no judgment" is contrary to the law and the evidence.

Conclusion.

In view of the undisputed facts of this case and of the authorities submitted, it is conclusive that a "ceiling" of \$75.00 was fixed as the maximum rental of the dwelling house in question; that no action was ever taken by appellees, nor by the rent control authorities to modify said registration or "ceiling"; that under the authorities cited, particularly Section 4(a) and Section 5(a) of the regulations of October 15, 1946, it was incumbent upon appellees to prove their authority for making any change in such maximum rent. Appellant submits that the written lease, typed and prepared by the appellee, W. E. Conrad, particularly the clause providing for the purposes for which the dwelling house would or might be used, conclusively negated appellees claims as to a limited use of the dwelling

house and that under the authorities cited such written lease superseded all prior or current oral negotiations or stipulations and precluded evidence attempting to vary the unambiguous terms of the written agreement.

Appellant submits that the evidence produced by her was entirely to the effect that the dwelling house was to be and was used for dwelling and housing purposes and that even the testimony of appellees' witnesses was to the same effect, viz.: that the premises were to be and actually were used for living and dwelling purposes. It is obvious that appellees were trying to evade the provisions of the Rent Control Acts. Mr. Conrad admitted that he gave the previous tenant notice to vacate on the ground that he was going to lease the property as business property. [R. 92.] He made some minor repairs [R. 92-93] but under the then existing law any such remodelling that would warrant eviction was required to be "a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance"; and even then only for the continued use of the premises as housing accommodations, and this could only be accomplished with the consent of the Administrator. Mr. Conrad made no substantial changes or alterations in the dwelling house, but rented it in its then present condition to Mrs. West for \$350.00. This was all part of his attempt to escape or evade the maximum rent registration or "ceiling" on the dwelling house. Even if the dwelling house had been rented for the business purpose of conducting a rooming house, boarding house or hotel, it would still be subject to Rent Control Regulations, and even if by any stretch of the imagination it could be held that appellant was conducting or had agreed to conduct a sanitarium in a dwelling house of the size and nature of that involved herein for a few elderly persons, it is

submitted this did not exempt nor decontrol the property from the classification of "housing accommodations."

We are constrained to the opinion that the Judgment of the District Court must be reversed and the case remanded with instructions to the District Court to determine the reasonable fees of appellant's attorneys and thereupon to enter Judgment in favor of appellant and against appellees for the amount so determined, plus liquidated damages in the sum of nine thousand nine hundred dollars (\$9,900.00), as prayed in the Complaint.

All of which is respectfully submitted,

GEORGE W. MANIERRE,

PAUL G. BRECKENRIDGE,

Attorneys for Appellant.

APPENDIX A.

Being a Resumé of Pertinent Acts of Congress and Rent Control Regulations.

Under the Emergency Price Control Act of 1942 (Jan. 30, 1942, c. 26, 56 Stat. 23) it was provided:

"Sec. 2(g) Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

"Sec. 201(a) There is hereby created an Office of Price Administration which shall be under the direction of a Price Administrator (referred to in this act as the 'Administrator'). * * * (d) The Administrator may from time to time issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Under Sec. 203, sub-paragraph (a) it was provided that any person subject to any provision of a regulation, order or price schedule made by the Administrator might file a protest; the merits of which protest should, under subparagraph (d) be passed on in the first instance by the Administrator. Section 204 provided for a review of the action of the Administrator by the Emergency Court of Appeals upon complaint of any person aggrieved by the denial or partial denial of his protest and gave exclusive jurisdiction to the Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, to determine the validity of any regulation or order issued under Section 2. Sub-paragraph (d) of this Section 204 provided "Except as provided in this section no court, Federal, State or Territorial, shall have jurisdiction or power to consider the

validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule or any provision of any regulation, order or price schedule, or to restrain or enjoin the enforcement of any such provision.”

The provisions above noted of the Emergency Price Control Act of 1942 were carried into the Amendment of 1944.

In pursuance of the authority vested in him the Administrator in the first instance issued his rent regulation for housing under which it was required that “within 45 days after the effective date of this maximum rent regulation, or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent, shall file in triplicate a written statement on the form provided therefor, to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this regulation for such dwelling unit, and shall contain such other information as the Administrator shall require.” (1388.987 of Rent Regulations.)

Section 1388.984 reads as follows:

“MAXIMUM RENTS. Maximum rents (unless and until changed by the Administrator, as provided in Sec. 1388.985) shall be

(a) for housing accommodations rented on March 1, 1942, the rent for such accommodations on that date * * *

(c) for housing accommodations not rented on March 1, 1942, nor during the two months ending on that date, but rented prior to the effective date of this maximum

rent regulation, the first rent for such accommodations after March 1, 1942."

This maximum rent regulation was subsequently amended so as to read "on or before the date specified in Schedule A of this regulation, or within 30 days after the property is first rented," etc., and there was appended to the amendment Schedule A of defense rental areas in which it appeared that Los Angeles County, except Catalina Township, was in the defense rental area under rent regulation for housing; that the maximum rent date was March 1, 1942; the effective date of the regulation was November 1, 1942, and that the date by which registration statement to be filed (inclusive) was December 16, 1942. (See Document No. 58272 Rent Regulation for Housing, Part 1388.1181 with Schedule "A" 10 FR 5089 and 10 FR 11666)

The Administrator later issued his Rent Regulation for Housing under date of October 15, 1946, which became effective October 16, 1946, and this was the regulation which was in effect on March 4, 1947, when the lease in question was made. The regulation applied "to all housing accommodations within each of the defense rental areas and each of the portions of a defense rental area as listed in the regulation";

Sub-paragraph (b) of Section 1 of this regulation reads as follows: "This regulation does not apply to the following: * * * (f) *Structures in which more than 25 rooms are rented or offered for rent.* Entire structures or premises wherein more than 25 rooms are rented or offered for rent by any lessee, sublessee or other tenant of such entire structure or premises: *Provided.* That this regulation DOES apply to entire structures or premises wherein 25 or less rooms are rented or offered for rent

by any lessee, sublessee or other tenant of such entire structure or premises, whether or not used by the lessee, sublessee or other tenant as a hotel or rooming house; And provided further, That this regulation DOES apply to an underlying lease of any entire structure or premises which was entered into after the maximum rent date and prior to the effective date of regulation, while such lease remains in force with no power in the tenant to cancel or otherwise terminate the lease."

Section 2 of this regulation is as follows:

"Prohibition against higher than maximum rents (a) General prohibition. Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation: and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received."

Section 4 of this regulation reads:

"MAXIMUM RENTS. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be * * * (i) *Rent established under former sections 5(e).* For housing accommodations with a maximum rent established, prior to March 1, 1943, under the first paragraph of section 5(e) as that paragraph appeared in Maximum Rent Regulations issued prior to such date, the rent on March 1, 1943, or, if the accommodations were not rented on that date, the last rent prior thereto,

but in no event more than the maximum rent established under such first paragraph of section 5(e). The Administrator may order a decrease in the maximum rent as provided in section 5(c)(8)."

Sub-section (a) of Section 5 of the regulation provides that: "Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable only on the grounds that: (1) There has been on or after the effective date of regulation a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance. * * *"

Paragraph (6) of Section 13 of this regulation defines 'housing accommodations' as follows: "'Housing accommodations' means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property."

The Congress subsequently defined "housing accommodations," in harmony with the regulations previously issued by the Administrator, in Section 202 of the Housing and Rent Act of 1947, as Amended, reading as follows: "(b) The term 'housing accommodations' means any building, structure or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, rooming or boarding-house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property."

It is significant that none of the provisions of the regulations above noted has ever been invalidated, modified, or set aside by either the Administrator, the Emergency Court of Appeals or the Supreme Court and that as and when promulgated, in accordance with the statute, no successful protest against them having ever been made, such regulations became, and since such promulgation have been, the law of the land.

Section 205(e) of the Emergency Price Control Act of 1942 (Public Law 421 of the 77th Congress, U. S. Code Congressional Service 1942 Page 23) in effect Jan. 30, 1942, provided that:

“If any person selling a commodity violates a regulation order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney’s fees and costs as determined by the Court. For the purposes of this section the payment or receipt of rent for defense area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be * * * Any suit under this sub-section may be brought in any court of competent jurisdiction and shall be instituted within one year after delivery is completed or rent is paid.”

The Emergency Price Control Act of 1942 provided for the recovery of treble damages by a tenant, but in the Amendment of 1944 (the Stabilization Extension Act of 1944, Public Law 383, 78th Congress, 1944 U. S. Code Congressional Service, p. 616) there was inserted the so-

called "Chandler Defense" so that Sec. 205(e) of the Act was made to read as follows:

"If any person selling a commodity violates a regulation order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater; (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.* For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price." (The so-called "Chandler Defense" is italicized.)

The Price Control Extension Act of 1946 (Public Law 548, 79th Congress, 2nd Session, 1946 U. S. Code Congressional Service 632 at 644) amended the second sentence of Section 205(e) of the Emergency Price Control Act of 1942, as amended, to read:

“In any action under this subsection, the seller shall be liable for reasonable attorney’s fees and costs as determined by the court, plus whichever of the following sums is greater (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however, That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.* (The so-called “Chandler Defense” as modified is italicized.)

The original Act as well as the Amendment of 1944 provided under Section 205(c) that the District Courts shall have jurisdiction of criminal proceedings for violations of Section 4 of this act and concurrently with State and territorial courts of all other proceedings under Section 205 of this Act. Section 205(e) of the Housing and Rent Act of 1947 materially modified the provisions of the preceding Sections 205 so as to read as follows: “Any person who demands, accepts, or receives any payment of

rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.* Suit to recover such amount may be brought in any Federal, State or Territorial court of competent jurisdiction within one year after the date of such violation." (The modified "Chandler Defense" is italicized.)

It will thus be seen that while the language conferring jurisdiction was substantially equivalent to that in the preceding Acts and the modified "Chandler Defense" was retained, the court was divested of jurisdiction to exercise its discretion to award less than treble damages unless the "Chandler Defense" was proven.

APPENDIX "B."

In the Appellate Department of the Superior Court, County of Los Angeles, State of California.

Baur Properties, Inc., etc., Plaintiff and Respondent, vs. Aaron Schwartz, et ux., Defendants and Appellants. Superior Court No. Civ. A 6623. Trial Court No. 820,772.

MEMORANDUM OPINION.

Appeal by defendants from a judgment and an order made by the Municipal Court of the City of Los Angeles, Joseph Marchetti, Judge. Reversed. Appeal from order dismissed.

Plaintiff brought this proceeding in unlawful detainer for non-payment of rent. Plaintiff founds its case on a notice demanding rent at the rate of \$75.00 per month. Defendants, not denying that the rent when they first went into possession was at that rate, set up in their answer two orders of the O.P.A. Rent Director, made March 17, 1947, which had the effect, they contend, of reducing the lawful rent to \$42.50 per month. If this is so, then plaintiff's notice demanded more rent than was due and is for that reason insufficient to support its judgment. (Johnson v. Sanchez, 1942), 56 Cal. App. 2d 115, 117.)

Copies of the orders pleaded were annexed to the answer and no affidavit denying their genuineness or due execution appears in the record. The record is duly certified by the clerk, it contains no notice from the respondent designating such an affidavit to be included in the record, and under Rule 21 of Rules on Appeal from Municipal Courts in Civil Cases we must presume that the

record is complete and sufficient for the determination of the appeal, and hence that there is no such affidavit. The genuineness and due execution of the orders annexed to the answers are therefore deemed admitted. (C. C. P., sec. 448; *Stoneman v. Fritz* (1939), 34 Cal. App. 2d 26, 30-1.) Copies of them were also introduced in evidence.

One of these orders declares that the Rent Director has determined that the maximum rent for the apartment occupied by defendant should be decreased, under certain specified provisions of the Rent Regulation, "effective from 1st rent date after December 1, 1942, . . . To decrease rates representing furnished condition to unfurnished condition," and then orders that the maximum rent "is decreased from as per Schedule attached" effective on the date above stated, that no rent in excess of that thus fixed may be received or demanded, and that any rent in excess of that so fixed collected since the effective date of the order except for one month in 1946, shall be refunded to the tenant. The attached schedule shows "Max. Rent" of \$75.00 per month, "Decrease" \$25.00 per month, and "New Max. Rent" \$50.00 per month, and is endorsed "To decrease rates representing furnished condition to unfurnished condition" and "The above rates include maid services, linens and utilities."

The other order of March 17, 1947, is in the same form, except that it declares it "shall be effective from 1st rent date after September 1, 1946, by reason of withdrawal of maid service and linens" and that there is no exception to the order for refund of excess rent collected. The attached schedule shows "Max. Rent" \$50.00 per month "Decrease" \$7.50 per month, and "New Max. Rent" \$42.50 per month, and is endorsed "Withdrawal of Maid Service and Linens."

Construing these orders, it is plain to us that each of them is an order directly and positively reducing the rent as stated in it, and forbidding the landlord to collect more than the amount of the reduced rent so fixed. Reasons for making the orders are stated, but they cannot reasonably be given the effect of establishing an optional schedule of several rents, either of which may be charged by the landlord according to the services, etc., furnished from time to time with the apartment. The provisions of the Rent Regulation for Housing referred to in the orders as their basis are section 5(c)(3) and section 5(b). The former authorizes an order decreasing the maximum rent when there has been a decrease in the minimum services, furniture, furnishings or equipment furnished on the maximum rent date and the latter authorizes a landlord to decrease services, etc., in certain cases, on condition that he notify the rent office, but also authorizes an order decreasing rent in such a case. Maximum rents once fixed can be increased only by an order of the Administrator (or Rent Director) made on petition of the landlord. (See sec. 4 and sec. 5(a) of the Regulation.) The Regulation does not contemplate the fixing of a sliding scale of maximum rents, depending on the services, etc., but a single maximum rent for the services, etc., furnished at the time it is fixed, and requires any change due to changing services, etc., to be made by the Administrator (or Rent Director).

In addition to stipulating that copies of the two orders above discussed might be put in evidence in place of the originals, the parties stipulated also "that the said Rent Director made three orders on Mar. 17, 1947, as follows: (a) That if said apartment 601 is furnished and is provided with maid service and linens, then the rent for said

apartment is \$75.00 per month. (b) That if said apartment is unfurnished and is provided with maid and linen service, then the rent would be \$50.00 per month, and (c) That if the said apartment is unfurnished and no maid service or linens provided, the rent would be \$42.50 per month.”

The plaintiff contends that we should accept this stipulation as determining what orders were made rather than look at the actual orders in evidence, and that, according to the stipulation, the orders do establish a variable schedule of rents, to be applied by the jury to such facts as they found true regarding the services, etc., furnished with the apartment. We need not decide whether these contentions can be supported. It is an admitted fact that the orders annexed to the answer were made, and for reasons already stated they must be given the effect of reducing the rent of defendant's apartment to \$42.50 per month. If the orders set forth in the stipulation operated to increase that rent to the \$75.00 per month demanded by plaintiff, they did so only if the apartment was furnished *and* provided with maid service and linens. It appears without conflict that long before the notice was given, plaintiff ceased to furnish linens to the defendants. Their excuse is that defendants had misused the linens formerly furnished them. This does not alter the fact that linens were no longer furnished. The order fixing the rent at \$75.00 per month, if made as plaintiff contends, is conditioned on the furnishing of linens, not on the existence of a good reason for not doing so.

The judgment is reversed and the cause is remanded for a new trial, appellants to recover their costs of appeal. The appeal from the order denying motion for a new trial is dismissed.

Dated April 13, 1948.

SHAW, Presiding Judge.

We concur.

BISHOP, Judge.

STEPHENS, Judge.

Filed Apr. 13, 1948. Earl Lippold, County Clerk; by
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No. 12194

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MABEL E. WEST,

Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

APPELLEES' REPLY BRIEF.

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PAUL P. O'BRIEN, /

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APPELLEES' REPLY BRIEF.

*To the Honorable, the Chief Judge and the Associate
Judges of the United States Court of Appeals for the
Ninth Circuit:*

Statement of the Case.

Appellees do not take issue nor materially controvert the Statement of the Case as propounded by Appellant in Appellant's Opening Brief. (Op. Br. pp. 3-4.) Three comments, however, it is believed are required to be made in order to more comprehensively cover and treat said opening statement.

Firstly, Appellees are compelled to state their opinion with regard to the language used by Appellant on page 3 of Appellant's Opening Brief; namely, the language indicating that the Defendant (Appellees) "was apparently . . . dissatisfied with said 'ceiling.'" Appellees contend that there is no room within a purported statement

of the case for argument and Appellant in stating that the Defendant was apparently dissatisfied with said ceiling is propounding a matter of argument.

Secondly, the opening statement as presented in Appellant's Opening Brief, after stating the nature of the action instituted by the Plaintiff (Appellant), merely states that the Defendants filed their Answer thereto, and although reference by page number is made to said Answer Appellees believe it is well to point out herein the fact that said Answer by them filed placed into issue the question of whether the subject premises were in fact offered for rent as housing or dwelling accommodations or used by Appellant as housing or dwelling accommodations.

Thirdly, Appellees believe that it is important to note that the instant case was tried in the District Court only after a prior case had been tried in the Superior Court of the State of California, in and for the County of Los Angeles, between the same parties, being Superior Court case No. 546213. Said cause came on for trial in said court on August 31, 1948. The trial in the instant cause in the District Court came on for hearing on October 12, 1948. The Superior Court action was one in Unlawful Detainer wherein these Appellees were Plaintiff and this Appellant was Defendant. Appellant having refused to pay rent in accordance with the lease [R. 16, Pltf. Ex. 1] and Appellees having demanded rent in conformity with said lease (\$350.00 per month) Appellees, after three-day notice to pay rent or quit, brought said action. Appellant by Answer pleaded the Housing and Rent Act in defense asserting that the maximum legal rent was in the

amount of \$75.00 per month and denying Appellees' allegations that said premises had been rented for and used for business purposes and, therefore, not within the scope of the rent control acts. Said Superior Court, after trial, found in favor of Appellees; namely, that the subject premises had been offered for rent as, and had been used as, business property. From said decision of said Superior Court Appellant filed her notice of appeal. However, neither the reporter's transcript or briefs in the matter have yet been submitted. The issue, however, it is respectfully submitted, is the identical issue here presented.

Statement of Questions Involved.

Appellees respectfully submit that there is here in fact but a single primary question raised. The question may be succinctly stated as follows: were the subject premises rented and used as housing accommodations under the control of the Office of Price Administration, or its successor, or were they not? It is submitted that a determination of this question, after an application of the facts to the applicable law, is the crux of the instant appeal. Should the foregoing question be answered by this court in the affirmative, the court below was in error. If, however, this Honorable Court resolve the question in the negative, as did the trial court, then the decision below must be affirmed.

It is urged that the statement of questions involved, as raised by Appellant (Op. Br. pp. 5-8), are not in fact the true questions here presented, and that the questions of (1) disregard of Federal regulations, (2) de-control of

housing accommodations, (3) variance of the terms of the written instrument, (4) evasion of Federal regulations, (5) lawful or unlawful use of premises and (6) termination of tenancy of previous tenant for purposes of "de-control" (these being the primary questions stated by Appellant to be here involved) are not in fact the true issues that this court is called upon to determine. The determination of the basic question here involved will in the instant case, as in all other similar cases, depend in large measure upon the facts involved. Thus, inescapably there will be begged the question of whether the evidence adduced does in fact support the Finding of the lower court that the premises here involved were not rented for or used as housing or dwelling accommodations within the meaning of the appropriate federal regulations.

The attention of this court is respectfully directed to the "points on which Appellant intends to rely." [R. 114-117.] That Appellant recognizes the basic issue here involved becomes apparent readily by Appellant's statements contained within the "points on which she intends to rely." [R. 114-117.] Appellant [R. 114] states that the trial court erred in not finding (a) that it was the mutual intention of the parties that the premises were to be used as housing, and (b) that the premises were, therefore, within the control of the rent acts. Appellant, having specified in said "points on which she intends to rely" that said points were the true points involved, should not at this time be heard to otherwise cloud the true issues here involved.

Reply to Alleged Errors, I Through XI.

Appellant urges that the Parol Evidence Rule, when properly applied in the instant case, should preclude the inquiry by the lower court into the intention and contemplation of the parties by them expressed in their negotiations and their conduct with reference to the purpose for which the premises in question were leased and to what use they were put. With this contention, Appellees cannot agree. It is submitted as elementary that the Parol Evidence Rule precludes only the variance or alteration of the terms of a written instrument when said instrument is in fact the integration of the minds of the parties. (See authorities contained in Appellant's Opening Brief at pages 13 and 15 thereof.) It is submitted that there is not in this case involved the problem of the alteration or the variance of the terms of a written instrument. The true question was most logically set forth by Appellant herself in her designation of "points on which she intends to rely" [R. 114-117], and more particularly in subdivisions 1, 2 and 7 thereof. Appellees do not believe that Appellant now seriously contends that the trial court was precluded from taking evidence as to the purpose for which the lease was made (that is, whether for housing or for business purposes) or the use to which said premises were put (that is, whether housing or business purposes), for this is the crux of the case and the real issue as framed by the pleadings.

Also, as a part of Appellant's argument (alleged error No. I, p. 13 of App. Op. Br.), Appellant lays stress on the

question of so-called "lawful or unlawful use." Appellees have at no time contended, nor do they now contend, that the premises here involved were put to an unlawful use by the Appellant.

Appellees do not take serious issue with the statements of law nor the citations thereof as set forth by Appellant with respect to what the law says or how the law has been interpreted in so far as housing and/or dwelling accommodations are concerned because it is the contention of Appellees that the premises here involved were not in the first instance within the scope of said rent regulations. Appellant in her Opening Brief (pp. 16-22) traces historically the development of rent control to the present time with great emphasis on the so-called "Chandler defense." Appellees concede, for purposes hereof, the correctness of said statements of law and history made by Appellant, and further concede that should the trial court have found, or should a correct application of the law and facts be that the premises here involved were "housing and/or dwelling accommodations" within the meaning of the federal statute, then many of the pertinent sections of law cited by Appellant might well be applicable. If, however, the subject premises were in fact and in law not leased nor used as housing and/or dwelling accommodations within the meaning of and as defined in the rent acts (Secs. 201B, 202B and 209A of the Housing and Rent Act of 1947, and said act as amended), then the remaining portions of said rent acts (as cited by Appellant) are inapplicable to the present case.

It is submitted that the remaining portions of Appellant's assignment of errors (alleged errors III through XI) deal with questions of fact. These problems will be treated herein under separate title.

Application of Facts to Law.

The Housing and Rent Act of 1947 and the amendatory statutes of 1948, among other things, provide as follows, to-wit: Section 201B—the restrictions imposed upon rents are upon those rents charged for *rental housing accommodations*; Section 202B—“the term ‘housing accommodations’ means any building, structure . . . rented or offered for rent for living or dwelling purposes . . .” (See Sec. 209A.)

It is now well established that the housing and rent act was never intended to apply to anything other than premises actually having been offered for rent for and used as premises for dwelling or living purposes. (Housing and Rent Act 201B, 202B and 209A; see *Creedon v. Cohen*, 73 Fed. Supp. 831 (D. C., N. D. Tex., 1947); *Wood v. Whitehouse*, 83 Fed. Supp. 268 (Feb. 22, 1949, W. D. N. Y.).

The pleadings in the instant case having squarely raised the issue as to whether or not the subject premises were offered for rent as housing and/or dwelling accommodations, and the lease in question having referred to said premises and the use to be made thereof as a “guest house or any other lawful purpose” [R. 7], the lower court had before it the duty of determining and inquiring into the contemplated use to which said premises were to have been devoted and the actual use that the Appellant made thereof. [R. 57.] Did the lower court properly apply the facts to the law as hereinbefore stated? Can this Honorable Court now re-try said facts if the Findings of the lower court are substantiated by the facts in evidence as adduced during the trial? It is the opinion of the Appellees that the trial court did properly apply said facts to the law as stated, and that its Findings therefrom are

supported by the facts in evidence as adduced from the testimony.

It is admitted that the evidence adduced is in conflict, but submitted that the preponderance thereof substantiates the position of Appellees. Relevant to the determination of the contemplated use to be made of the premises and the purpose for which it was rented is the testimony of the Appellant that the lease should provide for subletting [R. 67] and that there was to be provision for public liability insurance and that other persons were going to occupy the premises. [R. 58.] Also of importance is the fact that the Appellant is a graduate nurse, and that she had come to learn of the subject premises being for rent through a newspaper advertisement. [R. 60; see Deft. Ex. A, R. 33.] Appellant had been in the business of operating a sanitarium since 1943, taking care of patients as doctors brought them in and advertising in the telephone directory as the Hollyview Sanitarium. [R. 59.] It appears from the evidence that the Appellant, shortly prior to the renting of the subject premises, was a party to a divorce action and that the Hollyview Sanitarium [R. 61] was community property. She discussed the sale of the said sanitarium with the Appellee, W. E. Conrad, or the taking of a loan thereupon for the purpose of purchasing her husband's interest therein. [R. 62-3.]

There was called as a witness for the Appellees a Dr. Westcott. His testimony is highly relevant and probative on the question of the use to which the subject premises were intended to be devoted and the actual use made thereof. His testimony indicates that as a practicing physician he first treated some patents at Appellant's Hollyview Sanitarium [R. 71]; that he had a conversation with the Appellant who informed him that she was obtaining a

divorce and attempting to divest herself of her sanitarium, and that she spoke of removing some patients from the sanitarium to the subject premises; that at least one of these patients was removed from the Hollyview Sanitarium to the subject premises [R. 72], and that she was an aged woman suffering from high blood pressure and strokes and in need of medical care, and that he continued to treat her at the subject premises, and that said patient was incapable of taking care of herself [R. 73]; that he also treated another patient and that his original patient was bed ridden on each of two visits, and that she was under medication and under care pursuant to his direction [R. 74]; further that the Appellant asked him to visit another patient which he did and that he saw other ambulatory patients about the premises, all of whom were elderly, and one of whom was blind. He also testified that the Appellant paid him for his visit to the original patient. [R. 75.]

Another witness (Mrs. Drake) called by the Defendants testified that the Appellant told her that it was a good location for business and that she (the Appellant) could keep a lot of people up stairs, and that she (Mrs. Drake) overheard the Appellee, W. E. Conrad, state to the Appellant that he wanted a professional business woman on the premises. [R. 80.] Mrs. Drake further testified that one patient (previously in the Hollyview Sanitarium) paid \$200.00 to the Appellant monthly and another \$150.00 per month; further that a nurse from the Hollyview Sanitarium cared for a male patient and the Appellant stated that she was to receive \$250.00 per month from said patient. [R. 81.] Mrs. Drake further testified that Appellant administered narcotics and that still another patient paid \$150.00 per month [R. 82]; that no

one prepared his own meals, but that meals were in fact on trays placed in the dining room. [R. 83.]

Mr. W. E. Conrad called as a witness on his own behalf testified that he offered the subject premises for rent by advertising the same in certain medical publications and newspapers of general circulation [Deft. Ex. A, R. 86], and that he and the Appellant had a conversation concerning the premises; that she was asked if she could run the premises as a business, and that she answered that patients were furnished to her by a doctor [R. 87]; that he advised her of the zoning details and that the premises had previously been registered and rented as housing, and that there was a rental ceiling on the same as housing, but that he proposed to make the premises a professional building, and that he would accept \$350.00 rental as such; that the Appellant had a nurse from the Hollyview Sanitarium inspect the premises. [R. 88.] Mr. Conrad further testified to a conversation between himself and the Appellant to the effect that the premises were to be used for professional purposes and that Appellant asked if Appellee had any objection to a sign on the premises to which he replied that he did not [R. 89]; that Mr. Conrad further testified, in reply to a question by the court, that he displayed a zoning map to Appellant, and that Appellant stated that she would have the foreman from her Hollyview Sanitarium inspect the property before she signed the lease in order to ascertain if the premises were suitable for ambulatory patients. [R. 91.] Mr. Conrad further testified that he and Appellant went into the matter of the conducting of a professional business on the premises thoroughly. [R. 94-95.]

It must be noted at this point, in view of the foregoing testimony, that Appellant in her Opening Brief at page 23

thereof makes the blanket statement that all of the testimony adduced at the trial, including that of the Appellee, Mr. Conrad, indicates that the subject premises were to be used and were used as housing and dwelling accommodations. Appellant fails to cite one reference to the record at this point, and her statement has no foundation whatsoever. It will also please be noted that the testimony hereabove set forth by Appellees refers to the record in each instance and can be substantiated.

Applying the facts and the testimony adduced in the instant case to the applicable law, it is urged that the trial court, having been called upon to determine whether the subject premises were offered for rent and used by the Appellant for the purpose of conducting a business therein, was entirely justified if not compelled to arrive at its finding that the subject premises were at all times contemplated to be used as business property and that after the execution of said lease said premises were in fact used as business property and not as housing or dwelling accommodations within the meaning of the Housing and Rent Act or said act as amended. It is submitted that cases of this character must each be tried and determined, each standing on its own facts; that there can be no hard and fast rule fixed for the determination of whether premises are or are not rented and/or used for business purposes on the one hand or housing on the other. The recent case of *Woods v. Whitehouse*, U. S. District Court, W. N. Y., decided in February of 1949 and reported in 83 Fed. Supp. 270, is illustrative of this last mentioned principle. The issue there presented was stated to be as follows, to-wit: "were the premises housing accommodations under the control of the Office of Price Administration or its successor?" The trial court in attempting to resolve this question announced the following facts to be used in de-

termining said issue: (a) the controlling factor is the predominant use made of the premises; (b) if the premises are not separable, they are to be treated as a unit for the purpose of this determination; (c) if the predominant use of the space is for business purposes, the property is not subject to the control of the rent acts.

In the instant case, it is urged, that the evidence indicates that the use contemplated to have been made of the premises was for the conducting of a business therein, and that it was the contemplation of the parties that the whole thereof was to be used for that purpose. It is further urged that the Court having had ample and abundant evidence before it to sustain its finding that said business use was contemplated by the parties, the said finding cannot now be disturbed.

The court's attention is similarly directed to the case of *Paxson v. Smock*, 73 Fed. Supp. 793, A.D., Pa., September 26, 1947. In this case the court had as its object the determination of the status of some six different premises, and the court there announced that the law had to be applied to the facts of each of the individual premises. The court found that some of the premises were within the control of the rent act, the same having knowingly been leased for housing purposes, and that the others were beyond the scope of the rent act, the same having been knowingly been let for purposes of conducting businesses therein, and this is true although apparently all of the premises involved appeared to have the external appearance of dwelling houses.

Equally interesting and illustrative is the case of *Creedon v. Cohen, supra*, in which the court was called upon to determine whether certain premises were or were not within the control of the rent control act. Said the court,

“bearing in mind the purpose of the rent control act, and the wording of the act, and such regulations as have been made under it by the Administrator, that are considered valid, it does not seem to me that there is anything in the case to indicate that there was any overcharge for the property as it was leased. It was from the beginning, and is today, a place of business. What I have said I find as facts, and those being the facts, judgment must go for the defendant.”

Conclusion.

Appellees' theory of the case is as follows: Appellant being the owner of the Hollyview Sanitarium in Los Angeles and being involved in divorce proceedings and her sanitarium being possibly subject to a disruption sought a re-location for her business and saw Appellee's advertisement in the newspapers. Negotiations were had concerning the desirability of the subject premises for the Appellant, and although the evidence is somewhat conflicting on the actual negotiations and what was said, it seems reasonably clear from the testimony that Appellee, W. E. Conrad, made known to Appellant that he did not desire to lease the premises except for business purposes, and that Appellant made known to Appellee that she was going to conduct a business therein. The lease was executed and sick and aged persons were taken into the premises and were there cared for. The testimony of Mrs. Drake and Dr. Westcott indicates clearly the use to which the premises were put. As it developed, it seems that the Appellant was able to retain her original sanitarium and

shortly after the execution of the lease she no longer had reason to keep the subject premises and sought to escape from the contract she had made by instituting the instant action.

On the facts as presented, two judges have already determined that it was the intention of the Appellant at all times to conduct a business within the subject premises. It is the opinion of Appellees that an exceedingly harsh and unfair result would be attained by permitting a lessee of premises to enter into a lease and then at will prosecute an action for overcharge and seek treble damages in order to escape from the terms of the written instrument.

WHEREFORE, these Appellees pray that the Judgment heretofore made in the instant action be affirmed.

Respectfully submitted,

ARNOLD LEADER,

LEONARD WILSON,

Attorneys for Appellees.

No. 12194

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

APPELLANT'S REPLY BRIEF.

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*To the Honorable, the Chief Judge and the Associate
Judges of the United States Court of Appeals for
the Ninth Circuit:*

Appellant Mabel E. West respectfully submits to the Court this, her reply brief.

I.

Reply to Appellees' Statement of the Case.

Appellees, under the heading of "Statement of the Case" present three points, therein termed "Comments."

The first two are so nebulous as not to require answer.

The third so-termed "Comment" is obviously highly improper and can only be considered as an undisguised attempt to interject in this appeal matters not a part of the trial below, and entirely outside the record.

Appellant would prefer to ignore such improper reference, but in fairness to herself, believes it incumbent to reply thereto.

The judgment referred to is not a final judgment. It was rendered in the Superior Court of Los Angeles County in an unlawful detainer action (a "special proceeding" under the California law with limited issues and defenses), filed on June 18, 1948, more than a month after this action had been filed in the Federal Court and after this action was at issue. The said Superior Court determined it had jurisdiction to proceed, and, even though at the time this case had already been set for trial in the Federal Court, refused to defer to the Federal Court, a court of competent and concurrent jurisdiction which had already assumed jurisdiction, and proceeded to set the unlawful detainer action for trial on August 31, 1948, and to try same on said date.

After trial, and on or about the 2nd day of September, 1948, the Superior Court Judge took the case under submission, in which status it remained until November 3, 1948. While the case was still under submission and not decided, the within case came on for trial and was decided by Judge Yankwich, and counsel for appellees herein wrote two letters, dated respectively October 23, 1948, and November 2, 1948, to the Judge who had the Superior Court case under submission. Copies of said letters are contained in the appendix hereto and speak for themselves. On November 3, 1948, the said Judge rendered his memorandum decision.

Regardless of the propriety or impropriety of said letters, they were written with the expressed purpose to influence the decision in the said Superior Court case then under submission.

Inasmuch as the legal consideration of a Federal Statute (Federal Rent Control case) was involved, it would probably not be presumptuous to assume under the circumstances that the decision in the Superior Court took into consideration (and not improperly) the statements that Judge Yankwich in the instant case had found for the defendants (appellees herein), even though the decision of Judge Yankwich was not a final judgment.

II.

Reply to Appellees' Statement of Questions Involved.

It is apparent that appellees have attempted to avoid rather than answer or meet the question raised by appellant and involved in this appeal. Appellees might just as well have gone one step farther and said the only issue was "Should the plaintiff prevail or should the defendants prevail?"

Appellees would completely ignore the question as to the fact of and effect of the registration of the premises under the act, the "ceiling rent" determined therefor, the express language of the lease, the spirit and purpose of the applicable Rental Control Acts, the steps and procedure, if any, required to remove or change the premises from the registered classification and "ceiling," the legal distinction, if any, between a business of providing housing accommodations and one providing commercial, industrial or non-housing accommodations. It is the opinion of appellant that all the points and questions raised by her in her brief are pertinent, relevant and essential, and appellant further submits that they are in conformance with, and follow, the points on which she stated she intended to rely on her appeal. [R. 114-117.]

III.

Reply to Appellees' Reply to Alleged Errors.

Appellees apparently have not understood the appellant's objection in respect to certain alleged incompetent evidence. Appellant's contention is that the written lease clearly and unambiguously provides for the use of the premises for any lawful purpose [R. 16] and appellees, in their answer [Para. III, R. 11; Para. III, R. 14; Para. II, R. 15], in the presentation of their case during the trial, and now in their brief, are attempting and have always attempted to contradict the lease in this respect and to attempt to show that it was a lease for particular purposes only.

Appellees apparently are also confused as to appellant's objections to certain evidence. In this connection, appellant's contention is not that the Court was precluded from taking evidence, but that the Court was precluded from taking certain incompetent evidence, as pointed out in appellant's opening brief.

Appellant does not understand the reference to unlawful use contained on page 6 of appellees' brief. The only reason for appellant's placing any emphasis on the term "any lawful purpose" is to show that the lease was not restricted to any particular purpose.

IV.

Reply to Appellees' "Application of Facts to Law."

Appellees apparently are in the position of not being able to see the forest for the trees. They have grasped at certain immaterial, entirely irrelevant and disassociated items or straws, and attempted to construct their defense thereon. They have pounced upon such items as the fact that appellant was engaged in a divorce action; the fact that she had, for a number of years, operated a sanitarium at a different address, and similar irrelevant and immaterial matters. For example, on page 8 of their brief, counsel states as follows:

"She discussed the sale of the said sanitarium with the appellee, W. E. Conrad, or the taking of a loan thereupon for the purpose of purchasing her husband's interest therein. R. 62-3."

The record discloses [R. 63] that this conversation took place around Christmas in December of 1947, approximately eight or nine months after the lease and occupancy by appellant.

On page 9 of appellees' brief, appellees state that Dr. Westcott "Continued to treat her at the subject premises." (Referring to Mrs. Dempster.)

Dr. Westcott's testimony was innocuous enough of itself, and evidence tending to impeach him is contained in the record [R. 112-113 and R. 71], but even he did not testify as stated in appellees' brief.

Dr. Westcott testified that he saw her in June of 1947 and that was the first time that he went there. He testified that the next time he saw her was about October [R. 78] and that those were all the calls that he had made to see any patient except Mrs. West and Mrs. Drake. In this connection it should be noted that Mrs. West (appellant) testified that Mrs. Dempster left the premises on the first day of June and never returned. [R. 106-107.]

Appellees claim that the record does not support appellant's contention that the evidence and admissions show that the premises were, and were used as and for, housing accommodations. The entire evidence is to the effect, and appellees cannot seriously contend otherwise, that Mrs. Drake intended to, and did reside in the premises, that the appellant did likewise, that each and all of the other parties who testified for appellant or concerning whom testimony was given, were housed and furnished with housing accommodations in the premises, that some, if not all, were furnished with meals, or at least a portion of their meals. Appellees apparently overlooked the fact that the word "guest" suggests the furnishing of housing and substance, as does that provision of the lease which reads as follows: "Lessee to take care of garbage, tin cans and burning of papers, etc." [R. 17.]

The trial judge in his Findings of Fact, refers to the premises as "said dwelling house." [R. 42.] Finally and possibly most significant, is the fact that the trial judge in his Findings of Fact and Conclusions of Law

[R. 41-44] makes no finding that the premises were used for business purposes nor that the premises were not used as housing and dwelling accommodations. The trial judge limits and confines his “Findings” and “Conclusions” (upon which rests the judgment herein appealed from) to what he finds to be “the mutual intention and contemplation of the parties” at the time of the making of said lease [see Finding of Fact VI, R. 43] and to what he concludes “was” and “was not” within the contemplation of the parties [see Conclusions of Law II, R. 44].

A reading of the cases cited by appellees,

Creedon v. Cohen, 73 Fed. Supp. 831;

Wood v. Whitehouse, 83 Fed. Supp. 268;

Paxson v. Smock, 73 Fed. Supp. 793,

discloses situations factually far different and distinguishable from that in this case. In the cases cited, the respective premises were rented and used for such purely commercial or non-residential purposes as conducting a barber shop; conducting a retail furniture business; conducting an automobile parking lot, and conducting a public religious meeting place.

Conclusion.

Appellant respectfully suggests that this case depicts a situation wherein a landlord conceives a plan whereby he believes he can get more rent than is permitted under the Rental Control Acts. He gets rid of the tenant then in possession by giving notice to terminate tenancy and then attempts to rent the premises for approximately five

times the amount of the registered rental ceiling. After some period of vacancy, he leases the premises to appellant for \$350 per month instead of the \$75 provided in the Registration Certificate. Upon discovery of the overcharge, this action is instituted under the provisions of the Rental Control Acts.

Having been caught in the toils of his own machinations, he now attempts to cast the blame upon appellant, not hesitating under oath to accuse her of “unlawfully, maliciously, knowingly and fraudulently” making certain representations to him “with the deliberate and conceived intent that she would be enabled thereby at a later date to bring before this Honorable Court the present proceedings and thereby unjustly, illegally and unlawfully procure a judgment herein for damages. . . .” [R. 14-15.] Is there one iota of evidence in the record, to excuse, let alone justify such scurrilous allegations?

In view of the record, the facts, and the law, appellant respectfully submits said judgment should be reversed.

Respectfully submitted,

GEORGE W. MANIERRE,

PAUL G. BRECKENRIDGE,

Attorneys for Appellant.





APPENDIX.

Oct. 23, 1948.

AIR MAIL

Hon. C. A. Paulsen,
Chambers Superior Court,
Trinity County,
Weaverville, California.

Re: Conrad vs. West.

Dear Judge Paulsen:

A few days ago I believe my associate, Mr. Leonard Wilson, advised you by telegram that in the case of West vs. Conrad tried in the Federal Court in Los Angeles, wherein there was involved the question of an alleged violation by Mr. Conrad of the rent control act, a decision was handed down by Judge Leon R. Yankwich, rendering judgment for the defendant, Mr. Conrad, against the plaintiff.

The findings, not yet prepared, will be to the effect generally, that Mr. Conrad did not violate the terms of the rent control act in leasing the subject premises to Mrs. West at the rental of \$350.00 per month, but that rather, he having leased said premises for business purposes, the same was not within the scope of the controls set forth in said rent control act.

This is further to advise you that on motion, it was further decided by said Federal Judge that the case pending in the Superior Court presently in your hands, and the case in the Federal Court, were of different nature; that one was not res adjudicata insofar as the other was concerned and that the jurisdiction was not concurrent there being in fact different relief asked for in each of the cases and the parties being different in both of the

cases; that is to say, the parties in the Federal case were plaintiff, Mabel E. West and the defendants, W. E. Conrad and Howard Conrad, while in the Superior Court case the parties were W. E. Conrad, plaintiff and Mabel E. West, defendant.

It appears to us that this decision of the Federal Court is of important significance in your deliberation and we felt you should have this information before you as soon as possible. You will, however, please forgive our delay in getting it to you as we have both been engaged in trial the past few days and this has really been the first opportunity that either of us has had to write in detail.

Yours very truly,

LEONARD WILSON & ARNOLD L. LEADER

By

AL:ls

LEONARD WILSON
Lawyer
1103 Quinby Building
650 South Grand Avenue
Los Angeles 14
Vandike 9138

November 2nd, 1948.

Honorable Charles A. Paulsen
Weaverville, California

In re: W. E. Conrad v. Mabel West
(Unlawful detainer)

Dear Judge:

You will find enclosed copy of findings of fact and conclusions of law and judgment in the case of Mabel E. West vs. W. E. Conrad, which were signed by Judge Yankwich of the United States District Court on November 1st.

Mr. Leader and I are of the opinion that it is proper to send you these findings for the reason that the court settles practically all of the objections to your jurisdiction raised in this case by defendants.

We were advised that you would be assigned to Los Angeles on the 1st day of November, but in calling the presiding judge's office yesterday we learned that your transfer was not to be effected.

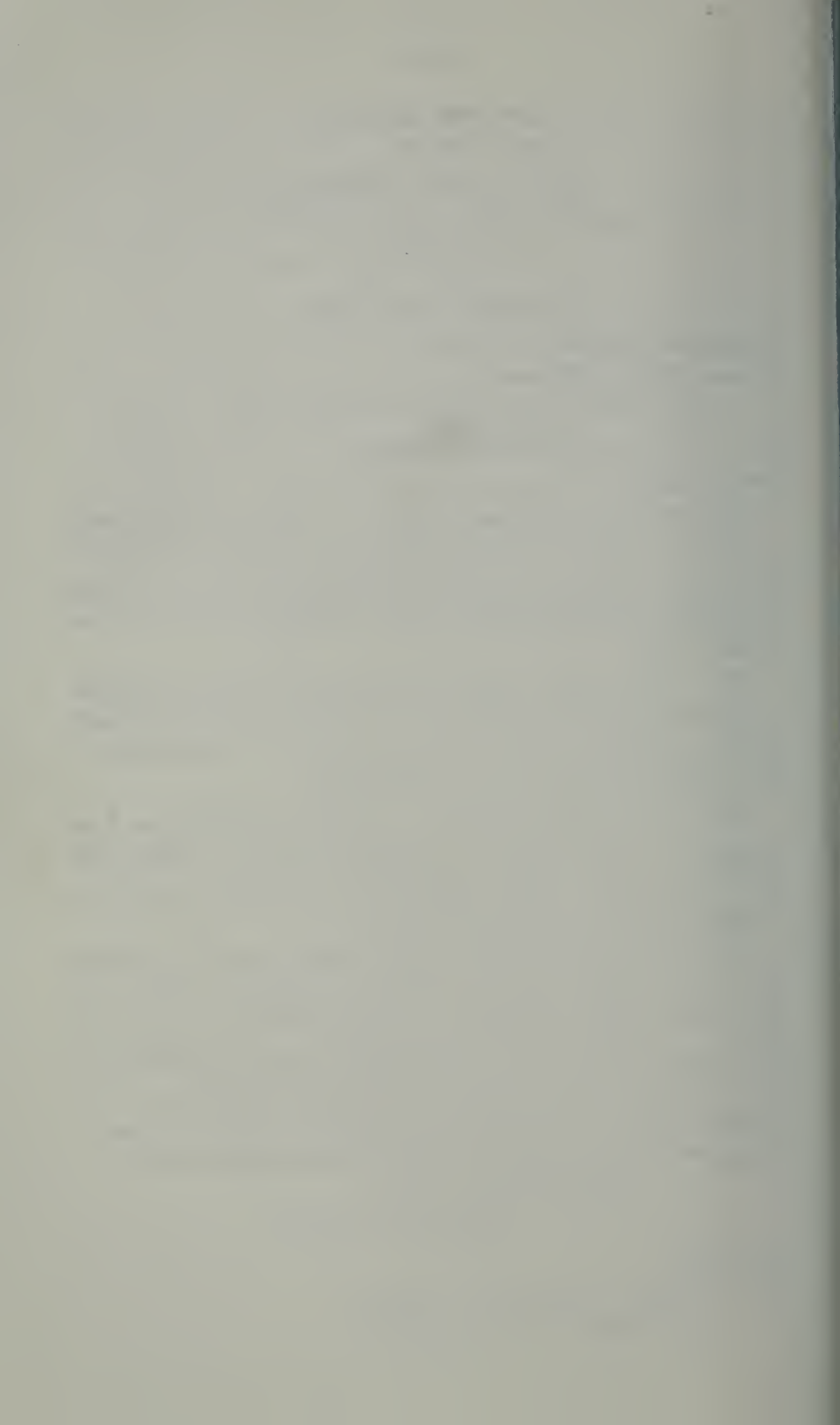
We feel that inasmuch as the Federal court has decided that Mr. Conrad did not violate the Federal OPA act, this leaves only a question of fact before your honor in this case, that is to say, the failure of the defendant to pay the rent as provided in the lease agreement. We contend that by reason of the failure to pay this rent a judgment for the plaintiff in this action should follow.

Respectfully yours,

LEONARD WILSON

LW:LK

c.c. to Messrs. George W. Manierre
and Paul G. Breckenridge.



No. 12195

United States
Court of Appeals
For the Ninth Circuit.

IRVING F. WIXON, District Director, Immigration and Naturalization Service,

Appellant,

vs.

TADAYASU ABO, et al., etc.,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

NOV 25 1949

PAUL P. O'BRIEN, CLERK

No. 12195

United States
Court of Appeals
For the Ninth Circuit.

IRVING F. WIXON, District Director, Immigration and Naturalization Service,

Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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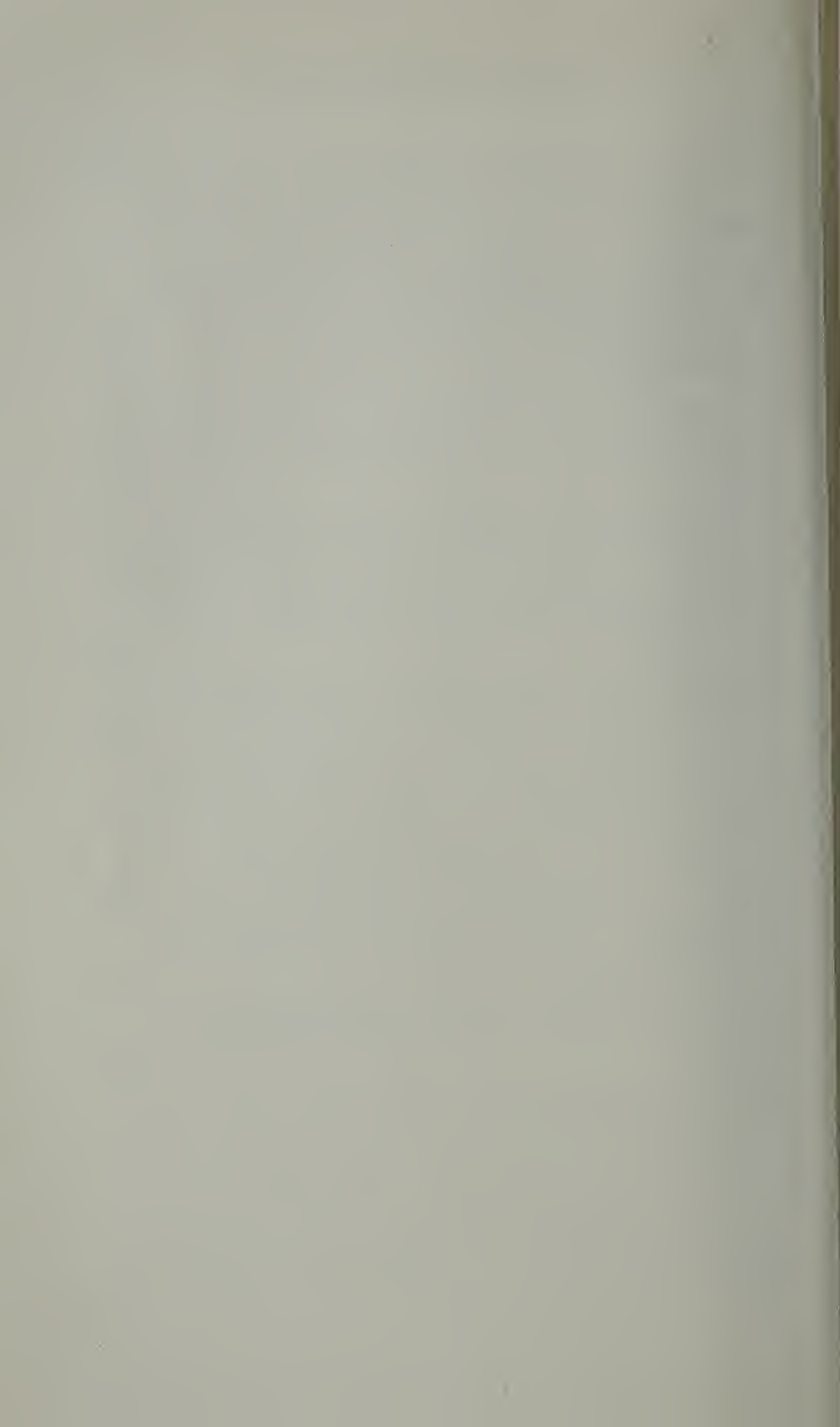
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In the United States District Court for the
Northern District of California

25296R

“TADAYASU ABO, et al., . . . , adults, individually, and as constituting a class, and as representatives of a class,

and

GENSHYO AMBO, et al., . . . , minors, individually, and as constituting a class, and as representatives of a class, by Harry Uchida, as the next of friend and as guardian ad litem of them and each of them, Applicants and Petitioners.”

vs.

IVAN WILLIAMS, as the Officer-in-Charge,
United States Department of Justice, Immigration and Naturalization Service, Tule Lake Center, Newell, Modoc County, California,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To The Honorable, The United States District
Court for the Northern District of California:

The application and petition of each of the applicants and petitioners above-named for a writ of habeas corpus respectfully shows:

I.

Each petitioner is authorized to being and maintain this proceeding in habeas corpus and this court is authorized and empowered to entertain original jurisdiction of this petition and proceeding under and by virtue of the provisions of the Habeas Corpus Acts, Title 28 USCA, sec. 451 et seq., and also by virtue of the provisions of Title 8 USCA, sec. 903.

II.

Each petitioner is a person having Japanese ancestry, and at all times herein mentioned has been domiciled in and a resident of the United States, a native-born American, a citizen and national of the United States and subject to the jurisdiction thereof, as provided by the 14th Amendment of the Constitution, the provisions of Title 8 U.S. Code, sec. 601(a), and as defined in Title 8 U.S. Code, sec. 501(a) and 501(b); none of the petitioners at any time whatever has been and none is an alien enemy and none at any time has been an alien; none at any time has been and none is a native, citizen, denizen or subject of Japan or of any hostile nation, government or country; none has at any time been and none is a danger to the public peace or safety and none has at any time been accorded a judicial hearing upon any charge or accusation that he or she was or is such a danger, and, on the contrary, the Department of Justice, in 1945, made a finding and declaration that each petitioner was not hostile to and was not a danger to the public peace or

safety; each petitioner at all times herein mentioned and ever since his or her said birth in this country has been and now is loyal and devoted to the United States; and, by virtue of the circumstances hereinafter set forth, each is a resident within the jurisdiction of this Court.

III.

The petitioners jointly and severally bring and maintain this proceeding under the procedure authorized in habeas corpus proceedings and the practice conforming to the practice in actions at law or suits in equity and pursuant to the provisions of Rules 20, 23(1), 23(2), 23(3), 18(a), 18(b), 19(a), 19(b), and 81(a)(2), of the Rules of Civil Procedure for the District Courts of the United States, uniting and joining in this single petition for the following reasons and purposes, among others, to-wit: (1) For the convenience and interest of the petitioners and respondents; (2) to promote the orderly, convenient and efficient administration of justice; (3) to avoid and prevent a multiplicity of suits; (4) because petitioners jointly and severally assert rights to release and discharge from the unlawful internment and detention in which they are held and because their rights thereto arise out of the same series of occurrences; (5) because there are several points of litigation and questions of law and of fact arising in said proceeding that are common to each and all of them; (6) because said proceeding is also a class action and the character

of the rights sought to be enforced for the persons and class of persons on whose behalf the same is brought and those who hereafter may be joined as petitioners herein is joint, common, and several; and (7) because there are common questions of fact and of law affecting the several rights involved and a common relief is sought by each petitioner against respondent;

The questions and issues of fact involved herein which are common to each and all of petitioners are: (1) Whether the petitioners are native-born American citizens and nationals of the United States or stateless persons or alien enemies, it being apparent that if petitioners are not alien enemies their internment was and is unlawful and they are entitled to immediate release therefrom, such internment and detention lawfully being applicable only to alien enemies during the actual period of time in which the United States is engaged in the prosecution of war and then only provided the internment and detention of specified alien enemies is commanded by the President of the United States and his authority so to do is invoked under and arises from the Alien Enemy Act; and (2) whether the renunciations of nationality signed by petitioners are void and invalid as having been signed under duress, menace, fraud and undue influence, as hereinafter alleged, and as having been rescinded, the political status of the petitioners depending upon a determination of the legality or illegality thereof;

Among the questions of law involved herein, which are common to each and all of the petitioners herein, are the following, to-wit: (1) The constitutionality and validity of Title 8, USCA, sec. 801(i), and the nationality regulations adopted pursuant thereto, on their face and as construed and applied to petitioners who contend the same are unconstitutional and void for being repugnant to the provisions of the 4th, 5th, 6th, 8th, 9th, 10th, 13th, and 14th Amendments of the Constitution and to the following provisions of the Constitution, viz., Article I, sec. 1; sec. 8, subd. 4; sec. 9, subd. 3; Article III, sec. 1; and sec. 3 subds. 1 and 2; and Article IV, sec. 2, subd. 1; and (2) whether the Alien Enemy Act, Title 50, USCA, secs. 21 and 22, which respondent asserts was invoked against petitioners and under which respondent asserts petitioners were and are interned as alien enemies, was lawfully invoked against them and was and is lawfully applied to them, and the constitutionality and validity of said Alien Enemy Act on its face and also as construed and applied to the petitioners who contend the said Act was unlawfully invoked against them and was and is unlawfully applied to them and also that it is unconstitutional and void on its face and as construed and applied to them for being repugnant to each of the aforementioned amendments and provisions of the Constitution.

IV.

Each petitioner, contrary to his or her will and desire, is unlawfully interned, detained for the purpose of an involuntary removal or deportation to Japan and restrained of his or her liberty by the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, at the Tule Lake Center, situated within the jurisdiction of this Court, at Newell, Modoc County, California, said Officer in Charge acting under the order or orders of the Attorney General of the United States and presently being one, Ivan Williams, respondent herein; and the said Attorney General and said Officer in Charge, acting under his order or orders, has announced and given notice of intention summarily to remove and deport each petitioner involuntarily to Japan;

The United States Department of Justice has publicly announced the early closing of the said Tule Lake Center where persons of Japanese descent and the petitioners, as such, heretofore have been and now are detained by the Government, and has ordered each petitioner and all other persons of like ancestry, there interned, who have signed applications for renunciation of United States nationality, upon a mere notice of approval thereof being given by an Assistant Attorney General of the Department of Justice, detained and restrained of his or her liberty for deportation purposes and has publicly announced that commencing on and after November 15, 1945, each petitioner and all

persons who have signed such renunciation applications will be forcibly removed and deported to Japan, and that petitioners and all such persons so scheduled for such removal and deportation to Japan will be so deported without any notice being given and without any hearings being accorded any of them thereon;

Said Officer in Charge at the Tule Lake Center, the respondent, Ivan Williams, acting under the orders of the Attorney General of the United States, under a claim of color of authority of the Alien Enemy Act, Title 50 USCA, sec. 21, asserts each of said petitioners is an alien enemy and that as such each has been and is interned and restrained of his or her liberty and is held and scheduled for such an involuntary removal or deportation thereunder to Japan, albeit that such assertion that petitioners are alien enemies or that any of them is an alien enemy is a false and fictitious assertion, claim, and assumption wholly unsupported by fact and by law and is a gross mistake and error of fact and of law.

V.

Each petitioner for a long period of time has been and now is interned and detained at said Tule Lake Center and now is under an order of removal or deportation to Japan, as each is informed and believes and therefore alleges, by reason of a claim that each, by a renunciation of United States nationality, thereby became an alien enemy and subject to such internment, detention and removal or

deportation under the provisions of the Alien Enemy Act, Title 50 USCA, sec. 21, the facts out of which such claim arises being as follows:

Each petitioner has had, in his or her ancestral line an unknown number of ancestors who, at some remote time in the past, were born in a geographical area over which a Japanese sovereign ruled and over whom such sovereign claimed, asserted and enforced, through the then instrumentalities of police power, a temporal jurisdiction. Solely because of said type of ancestry each petitioner, pursuant to proclamations, commands and orders of General John L. DeWitt, then Commander of the Western Defense Command and Fourth Army, during the year 1942, first was imprisoned in the immediate vicinity of his or her then home, situated within the geographical area embraced by the Western Defense Command, then driven into and imprisoned in stockades called assembly centers, thereafter transported to concentration camps called War Relocation Centers and there confined for approximately three years, and thereafter imprisoned in the Tule Lake Center, Newell, Modoc County, California, said imprisonment having been continuous from 1942, to date, all without a charge of crime or accusation of crime having been lodged against any of them, and without any hearing having been given them on the reasons for such treatment, and in spite of the fact that the Attorney General of the United States in 1945 caused each to be notified that he or

she had been found to be a person not dangerous to the security of the United States;

That during the entire period of his or her unlawful imprisonment, commencing in 1942, and continuing ever since, as aforesaid, each petitioner has been and still is deprived of substantially all his or her rights, liberties, privileges and immunities guaranteed by the Constitution to him or her as a native-born citizen and national of the United States and subject to the jurisdiction thereof, as also those guaranteed to him or her as a person thereunder, said deprivations having been committed by governmental authorities under a claim of color of authority of the United States;

During the preceding period of 1945, at said Tule Lake Center, each petitioner signed an application for renunciation of United States nationality, as provided for by Title 8 USCA, sec. 801(i), and the Rules and Regulations adopted by the Department of Justice under the Nationality Act of 1940, as amended, said Rules being more particularly designated as Sections 316.1 to 316.9, inclusive, of Chapter I, sub-chapter D, part D, of Nationality Regulations; that none of said applications has been approved by the Attorney General of the United States, nor has he ever issued an order approving any of them, as is required by Title 8, USCA, sec. 801(i) and Rule 316.7 of the Nationality Regulations, before such becomes effective; that each petitioner has received a letter from a representative of the Department of Justice stating that his or her

renunciation has been approved by the Attorney General as not contrary to the interests of the national defense, and informing each that he or she no longer is a citizen of the United States and is not entitled to any of the rights and privileges of such citizenship;

The signing of said application for renunciation was neither under oath nor real nor free nor voluntary on the part of any of said petitioners but was caused by and was the result of duress, menace, fraud, undue influence, mistakes of fact and of law and was the product of the fear, coercion and intimidation under which each then and there was held and subjected to and under which he or she labored, all as hereinafter set forth;

In signing said renunciation applications, none of the petitioners was informed, knew, intended or expected, by reason thereof to be interned, detained and restrained of his or her liberty as an "alien enemy" or otherwise, and none was informed, knew, intended, or expected that he or she would be involuntarily removed or deported to Japan by reason thereof, and, on the contrary, was led to believe by the Government, its agents, servants, and employees, that the signing thereof was not final, but tentative, and subject to being rescinded and revoked.

VI.

The internment and detention of each petitioner and the restraint upon the liberty of each, as aforesaid, and the threatened, imminent and impending involuntary removal and deportation of each to

Japan, as aforesaid, are, and each of said things, is, in violation of the Constitution and laws of the United States, as heretofore stated, and deprives each of the due process of law guaranteed by the 5th Amendment of the Constitution, in the following particulars, to-wit:

A: The unconstitutionality and illegality of the internment and detention of each petitioner and the restraint upon his or her liberty:

(1) That none of the applications for renunciation of nationality signed by petitioners has at any time whatsoever been approved by the Attorney General of the United States nor has an approval nor an order approving any of the said applications at any time been made by him nor has he at any time passed upon or considered any of them as required by the provisions of Title 8 USCA, sec. 801(i), and by the provisions of sec. 316.1 to 316.9, inclusive, of Part 316, sub-chapter D, Chapter I of Nationality Regulations, before a renunciation therein provided for becomes effective;

(2) That at the time each petitioner signed said renunciation application the United States was engaged in the prosecution of a war and, by reason thereof, any approval of a renunciation of nationality by any of the petitioners necessarily would have been contrary to the interests of national defense and to the sovereignty of the United States and violative of the provisions of Article III, section 3, subdiv. 1 of the Constitution;

(3) That the hearing accorded each petitioner upon his or her application for renunciation was nothing but a perfunctory pseudo-hearing or command appearance before a hearing-officer designated by the then Attorney General of the United States and was wanting in each and all of the elements of a fair and impartial hearing, and in the incidents thereof, in that each petitioner was deprived of the benefits of independent advice and counsel and of the assistance of counsel in and about said hearing, was denied the right to be confronted by any evidence and to examine witnesses against him or her or to produce witnesses in his or her behalf, albeit none of the petitioners waived his or her rights thereto; that at each such pseudo-hearing, the hearing officer's recommendation on each application was based, either in whole or in part, upon secret information and data available to and used by the hearing officer but which was withheld, concealed and kept secret from each petitioner, as provided by the provisions of Section 316.6 of the Nationality Regulations of the Department of Justice; and any approval thereof, had any approval or order approving any of said renunciations been issued or made by the Attorney General of the United States, necessarily would have been based wholly or partially thereon;

(4) The signing of the renunciation applications by each petitioner was neither under oath nor real nor free nor voluntary but was caused by and was

the result of duress, menace, fraud, undue influence, mistakes of fact and of law and was the product of the fear, coercion and intimidation under which each then and there was held and subjected to by the government and by groups and gangs, and by individuals, as hereinafter set forth:

(a) Commencing with their unwarranted and unjustified evacuation from their homes in 1942, as aforesaid, and continuously since then to date, the United States government, acting by and through its agents, servants and employees, and as the jailor, custodian and guardian of petitioners, its wards, has discriminated and still discriminates against the petitioners and each of them simply because of their descent from persons of Japanese origin and, ever since their unlawful imprisonment in the vicinity of their homes immediately preceding their said evacuation and continuously thereafter during their imprisonment in concentration camps and during their internment in the Tule Lake Center, has unlawfully confined them and members of their families and subjected them and members of their families there confined to governmental duress, menace, fraud and undue influence and harassment and held and still holds them in a continual mental state of fear and terror simply because of their Japanese ancestry; the United States government, pursuant to its said policy and program of discrimination and in furtherance thereof, steadily and systematically has subjected them to a course of abusive treatment during said

period of time; pursuant to said policy and program it has, by said continuous imprisonment without according them or any of them a hearing on the reasons therefor, regarded, classed and treated them as though they were alien enemies; all the males among them of draft age, including the many who have served faithfully in our armed forces and hold honorable discharges therefrom, the many others who were transferred to and now are in the enlisted reserve and subject to being called for active duty and the many who repeatedly have volunteered to enlist in the Army but were refused and denied the right to serve and to fight for and defend this country by prejudiced and hostile draft boards and by draft boards denying them such rights upon governmental orders and who are still denied this birthright, were classified "4-C" under the Selective Training and Service Act of 1940, that is, as "Alien Enemies," by draft boards acting upon governmental orders, without good cause and without justification and in violation of their rights as American citizens, simply because they were of Japanese descent; by reason whereof, petitioners and all of said persons of like descent likewise confined to said Center were led to believe and feared and had good cause to believe and fear that the Government of the United States viewed them as alien enemies and desired and intended to deprive them of the right to remain in and to fight for this country and to imprison them for an indefinite period of time and thereafter to remove and banish

them and their families and all like descended persons from the United States; that the government, after having encompassed their ruin by the aforesaid evacuation and their subsequent continuous confinement, led petitioners to believe that the alien Japanese members of their families were scheduled and held for removal and deportation to Japan and that the citizen members of said families would be detained in this country and thereby caused alien parents, who feared the splitting of their families, to coerce their citizen children into signing renunciation applications, and led petitioners to believe that the signing of said applications was a matter commanded by the government, compliance with which was a prerequisite to their right and that of their families to remain in the protective security of said Center and to prevent a disuniting of their families and to save themselves and their families from physical harm and violence were they to be released and sent back into civil life in communities where hostility to persons of Japanese ancestry reigned and where they feared they would suffer great physical harm and probable loss of life from lawless elements; and the government very recently has initiated the practice of permitting aliens to leave said Center and return to their former homes while it holds their children who have signed said renunciation applications for involuntary removal and deportation to Japan and now also compels those who have been released from confinement and those who were lucky enough to have escaped it al-

together, including those of our soldiers of Japanese ancestry returning from the battlefields of Europe and the Pacific who have parents, wives, sisters, brothers, or children interned in said Center and scheduled for deportation to Japan, to the choice of an involuntary banishment from the United States to accompany them to preserve family unity or to remain here separated from them; that the signing of said applications and the pseudo-hearing held thereon was a trap designed by the Government of the United States to cause and result in the involuntary deportation of each signer to Japan and of the involuntary removal of members of his or her family to Japan and thus to result in a mass banishment of persons of Japanese descent from the United States, which design and purpose, was at all times heretofore withheld, concealed and kept secret from the signers and petitioners; and, by reason of said governmental duress, menace, fraud, and undue influence, and the threats, coercion and intimidation practiced upon each petitioner and members of his or her family each petitioner was compelled by the government to sign a fictitious renunciation of a citizenship of which each already, in fact, had been deprived by the Government of the United States;

(b) That neither at the time each petitioner signed an application for renunciation at the pseudo-hearing held thereon at said Center nor at any time prior thereto during his or her unlawful confinement, was he or she a free agent in any sense

of the words but then and there was unlawfully confined and restrained of his or her liberty and was held in duress by the United States government, its agents, servants and employees, as the jailor, custodian and guardian of petitioners, its wards, and by it and its agents, servants, and employees, knowingly was permitted to be exposed and subjected to the duress, menace, fraud and undue influence practiced upon and against each petitioner by organized terroristic groups and gangs of persons, likewise there confined, who were fanatically pro-Japanese and committed to forsaking this country and who were engaged in and allowed to engage in a continuous campaign to engender, develop and promote loyalty to Japan among the internees;

The said groups and gangs there were engaged in and were permitted to engage in a generalized campaign of lawlessness prior to the time said renunciation hearings were held and at the time of said hearings had established and then and thereafter maintained a veritable rule and reign of terror over petitioners, their families and internees residing in said Center; they preached and practiced sedition; they endeavored, by all means at their command, to proselyte to the cause of the enemy the petitioners, their families and other loyal internees there residing; they actively engaged in the engendering, development and promotion of loyalty to the cause of Japan which they openly and notoriously espoused; they informed petitioners that

petitioners and their families were regarded by the United States government as alien enemies and that it had scheduled them and their families for deportation to Japan; they informed petitioners and internees at said Center that innumerable acts of physical violence had occurred to persons who had been relocated in civil life and that their lives would be in jeopardy, because of community hostility, if any succeeded in being returned to civil life in this country; they threatened the petitioners and internees that if any of them talked to, communicated with or associated with any of the Caucasians in and about said Center those so doing would be assaulted by goon-squads, gangsters and hoodlums sponsored and commanded by them; they sent in spurious letters to the Department of Justice requesting applications be forwarded to internees whose names they signed to such letters and then informed the receivers that the government demanded that each receiver sign it; they maintained and operated schools in said Center to coach the victims of their fraud, menace, deceit and undue influence into giving false and untrue answers to questions the hearing officers were to propound to them at the hearings on renunciation applications; they informed petitioners, as did governmental announcements publicly made just prior to the time said hearings were held in 1945, that the deportation of each petitioner and that of alien members of his or her family, on an exchange ship, was imminent and impending, and said groups and gangs informed

and threatened each petitioner that he or she would be deported in any event and that if he or she failed to sign an application for renunciation the security of each and that of their families upon arrival in Japan would be endangered because the pro-Japanese leaders of said nationalistic pressure groups and gangs would report them to the Japanese government as being dangerous alien enemies to Japan and as American spies and that they would there be seized and punished as such; they maintained an elaborate system of black-listing and espionage over the internees in said Center as part of their plan of systematic tyranny and terror to which they subjected petitioners and the other internees in said Center; that said groups and gangs threatened, coerced and intimidated petitioners into signing said renunciation application by means of threats, displays, shows, exhibitions and demonstrations of force and violence and by threats against their lives and by threats of inflicting great physical injury upon them and upon members of their families in the event he or she failed to obey their mandates and to sign such renunciation applications and thereby compelled each of them to sign such renunciation application; that each petitioner believed in and feared and had good cause and reason to fear that said threats would be carried into execution and that he or she and his or her family would be exposed to physical violence and probable loss of life if he or she failed to heed said threats and failed to obey the mandates of said pressure groups

and gangs and thereby was compelled to sign such renunciation application; that by reason of said rule of terror prevailing over said Center which, together with the failure of the government to take steps to prevent, halt and put a stop thereto and to accord them protection against the same, and by reason of the duress practiced by the government against them, as aforesaid, the petitioners and other internees in said Center were kept in a constant state of fear, fright, mass hysteria and terror and, by reason thereof, and because of the absence of protection against the terroristic activities of said groups and gangs being afforded by the government which was their due many loyal and innocent internees were driven into becoming nominal but inactive members of such groups simply to save themselves and their families from danger, physical violence and probable loss of life from such sources, and petitioners were compelled involuntarily to sign said renunciation applications by reason thereof;

That at all times during said rule and reign of terror imposed upon the internees in said Center the United States government, and its agents, servants and employees, were aware of and knew of the purposes and activities of said groups and gangs and of the duress, menace, fraud and undue influence said groups and gangs practiced upon and against petitioners, members of their families and other internees in said Center, but condoned the same and was responsible for, and actually aided and abetted the same by permitting such activities

and by failing to prevent and to stop the same and by failing to arrest and prosecute the leaders and active members thereof and to put a stop to their criminal activities and lawlessness and by failing to invoke the federal sedition and espionage laws or other criminal laws against them and by failing to segregate such criminal elements from the petitioners and other loyal internees and to isolate them;

By reason of the duress, menace, fraud and undue influence practiced and exerted upon and against each petitioner by the government and by the groups and gangs, as aforesaid, and the failure of the government to accord them the protection against the aforesaid lawless acts of said groups and gangs, the petitioners were caught in the grip of terror which ruled throughout said Center and the wave of terror that engulfed them when they and members of their families were confronted with a possible return to face hostility in the communities from which they had been excluded and driven by the 1942 imprisonment program which was termed an evacuation and was initiated by civilian exclusion orders issued by General John L. DeWitt, as aforesaid;

That none of said renunciations were real, free or voluntary on the part of any of petitioners, but each was the product of fear, torment and terror induced in each petitioner's mind by virtue of the duress, menace, fraud and undue influence to which each was subjected by the government and by the groups, gangs, and individuals, as aforesaid, all of

which operated to deprive and did deprive each petitioner of freedom of choice, will and desire in and about the signing of such applications for renunciation and each of said renunciations was and is false, fictitious, null and void by reason thereof;

(5) That if it should be adjudged by the Court that any of the petitioners has lost his or her nationality by reason of signing such renunciation application, coupled with a valid order having issued thereon by the Attorney General of the United States approving the renunciation as not contrary to the interests of national defense, none of the petitioners thereby became an alien enemy within the meaning and intent of the provisions of the Alien Enemy Act, 50 U.S. Code, sec. 21, et seq., but became a mere inhabitant of this country and a stateless persons entitled to remain here as an inhabitant and resident of this country and to be free from internment, detention and restraint under said Act;

(6) The provisions of the Alien Enemy Act and of Title 8 U.S. Code, sec. 801(i), are not now in effect as to any of the petitioners or at all, inasmuch as the United States is not now engaged in the prosecution of a war within the meaning, intent and purview of said provisions.

(7) The provisions of Title 8 USCA, sec. 801(i), are unconstitutional and void for uncertainty and also for containing an improper delegation of legislative and judicial powers to the Attorney General of the United States, in violation of the provisions

of Art. I, sec. 1, and Art. III, sec. 1, of the Constitution.

B: The Unconstitutionality and Illegality of the Removal and Deportation of Each of Petitioners:

(1) None of the petitioners is an alien enemy within the intent, meaning and purview of the provisions of Title 50, USCA, sec. 21, as aforesaid;

(2) No warrant for the deportation of any of the petitioners has at any time issued from the President of the United States or from any court, judge or justice, as is a prerequisite to involuntary removal or deportation under Title 50, USCA, sec. 24;

(3) No complaint at any time whatever has been filed against any of the petitioners, as required by Title 50, USCA, sec. 23, nor has any of the petitioners ever had a judicial hearing on such removal or deportation, in any court of competent jurisdiction, nor has any such court at any time issued any order of removal or deportation against any of the petitioners, all of which are jurisdictional prerequisites to removal or deportation in involuntary removal or deportation proceedings under the said Alien Enemy Act;

(4) That none of the petitioners has been allowed a reasonable period of time consistent with the public safety and according to the dictates of humanity and national hospitality within which to recover, dispose of and remove his or her goods and

effects and prepare for his or her departure, all as required by Title 50 USCA, sec. 22, in involuntary removal or deportation proceedings under the said Alien Enemy Act;

(5) None of the petitioners has been accorded and none will be accorded any hearing with respect to his or her said involuntary removal and deportation to Japan but summarily will be removed and deported, as aforesaid, and in such summary removal and deportation en masse without any hearing having been given or intended to be given to petitioners and each of them thereon prior thereto the respondent and the United States Department of Justice have grossly discriminated against and do still continue to discriminate against them and each of them in that respondent and said Department of Justice heretofore have followed the practice and policy and now do follow the practice and policy of granting individual prior hearings in similar removal and deportation proceedings to all persons of German and Italian nationality whom the respondent and said Department of Justice have sought to remove and deport and are seeking to remove and deport under the provisions of the Alien Enemy Act; and said discriminatory treatment meted to petitioners and each of them denies them and each of them the equal protection of the laws and deprives them and each of them of the due process of law guaranteed them and each of them by the 5th Amendment of the Constitution;

(6) That neither a declared nor an undeclared war now exists between the United States and any foreign nation or government; that no invasion or predatory incursion is being perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government; that the United States is now at peace with the world;

(7) Many of the petitioners were minors at the time they signed the renunciations applications and many still are minors and their said renunciations have been rescinded and revoked, as hereinafter mentioned, and, consequently, the internment, detention and restraint of each of them and the threatened and intended removal and deportation of each is unconstitutional, invalid and void for each of said reasons.

That the written orders, records and documents relating or pertaining to any and all of the petitioners in connection with the matters and things set forth in this petition are in the exclusive possession, custody and control of the respondent and the United States Department of Justice; and neither the petitioners nor any of them know the nature or contents thereof and none of them now has or at any time has had access thereto and the same never have been made available to petitioners or any of them or to their counsel and the same are now withheld from them and each of them and their counsel by the respondent and said Department of Justice.

VII.

Prior to the time of the filing of this petition each petitioner, twice in writing, notified the Attorney General of the United States, his agents and representatives, and the respondent as one of his agents, of the circumstances under which he or she signed such renunciation application, and that he or she withdrew, retracted, rescinded, revoked, cancelled and annulled his or her said application for renunciation of United States nationality for the reasons that the same was signed under duress, menace, fraud, undue influence and mistakes of fact and of law, as aforesaid, and informed him and them of the grounds and reasons on which said rescission and revocation was based and made but said Attorney General failed and still does fail to accept said rescission and revocation; that in each of said written notifications sent to the Attorney General of the United States each of said petitioners demanded of him and of respondent, Ivan Williams, as the aforesaid Officer in Charge at said Tule Lake Center, that he or she be released and discharged from said internment, detention and unlawful restraint upon his or her liberty, asserting therein the various grounds and reasons therefor, both factual and legal, but the Attorney General of the United States, his agents and representatives, and Ivan Williams, as the Officer in Charge of said Tule Lake Center, as aforesaid, acting under his

orders, failed and refused and do still fail and refuse to release and discharge each and all of said petitioners from said internment, detention and restraint and threatened removal or deportation to Japan; that a copy of the last written demand so made by each petitioner on November 1, 1945, by registered air-mail letter, is annexed hereto, incorporated herein, made a part hereof, and is marked Exhibit "1";

None of the petitioners is held by virtue of any complaint, indictment, presentment, warrant, or quarantine law, rule, regulation, arrest or order, except as hereinabove specifically set forth;

That no prior application for a writ of habeas corpus in regard to the internment, detention or restraint complained of in this petition has been made by petitioners or by any of them, in this or any other court.

Wherefore, each petitioner prays that a Writ of Habeas Corpus be granted and issued herein directed to the said Ivan Williams as the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, at the Tule Lake Center, Newell, Modoc County, California, commanding him to have the body of each petitioner before the above-entitled Court at a time to be specified therein, to do and receive what then and there shall be commanded by the Court concerning each petitioner, together with the time and cause of the detention of each, and said writ; that each petitioner be restored to his or her liberty; that the

Court find and adjudge that his or her application for renunciation of United States nationality was and is null, void and of no effect, and that any approval thereof made by the Attorney General of the United States or order issued by him approving the same, if any ever was made, was and is null, void and of no effect; that the Court find and adjudge that each petitioner is not an alien enemy and that each is a national and citizen of the United States; that the Court find and adjudge that his or her internment, detention and restraint was and is void and illegal; that any and all orders for his or her involuntary removal or deportation to Japan or to any foreign country or elsewhere be vacated and canceled; that each have his or her costs of suit; and each petitioner prays for such other and further relief as may be just.

Dated: November 5, 1945.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

United States of America,
State of California, County of Modoc—ss.

Harry Uchida being first duly sworn, deposes and says: That he is one of the petitioners in the foregoing application and petition for writ of habeas corpus named; that he is confined and detained at the Tule Lake Center, Newell, Modoc County, California, as alleged therein; that he makes this affidavit and verification of said appli-

cation and petition on his own behalf as such an applicant and petitioner and on behalf of each and all the applicants and petitioners in said application and petition, each of whom likewise is confined and detained at said Tule Lake Center by the respondent, as alleged therein, and each of whom has authorized him so to do, and, because it is impracticable to have the same verified by each of them by reason of the aforesaid confinement and detention of each, their large number and the long period of time which would be required and be consumed to have such done and because of the shortness of time due to the threatened and imminent involuntary removal and deportation of each and all of said petitioners, as alleged therein; that he personally knows the facts set forth in said application and petition which apply equally to each and all of said petitioners; that he has read the foregoing applications and petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such that he believes it to be true.

/s/ HARRY UCHIDA.

Subscribed and Sworn to before me this 7th day of November, 1945.

[Seal] /s/ JOE J. THOMAS,

Notary Public in and for the County of Modoc,
State of California.

My Commission Expires Sept. 20, 1949.

EXHIBIT 1

San Francisco, California.

November 1, 1945.

Honorable Tom Clark,
Attorney General of the U. S.,
Department of Justice Building,
Washington, D. C.

Dear Sir:

Each of the persons whose name appears on the attached list, hereinafter referred to as the renunciant for the sake of clarity, at all times herein mentioned has been and now is interned in the Tule Lake Center situated in the vicinity of Newell, Modoc County, California. Ostensibly each of said persons there is confined as an asserted renunciant of United States nationality. Under a claim of color of authority under the Alien Enemy Act, 50 U.S. Code, sec. 21 et seq., each of them is classed, treated and detained as an alien enemy in said prison, concentration or internment camp by you or under your authority. The reason for this continued and oppressive imprisonment of said persons appears to be that at a perfunctory appearance before a government official, representative or hearing officer, presumably designated as such by the then Attorney General of the United States, each of the said persons, in the early part of 1945, signed an application for renunciation of United States nationality on a form prescribed and supplied by the Department of Justice.

Exhibit 1—(Continued)

The signing of said renunciation forms was not under oath. It was neither real, free nor voluntary on the part of any of the said persons but was obtained through duress, menace, fraud, undue influence and mistake of fact and of law, and through the means of each of said things, all as you heretofore have been informed by each of said person's recent letter to you revoking such renunciation.

Each of the said persons has received a letter from a representative of your Department which contains a notice stating, in substance, that said renunciation has been approved by the Attorney General as not contrary to the interests of national defense and that the signer of said renunciation form no longer is a citizen of the United States and is not entitled to any of the rights and privileges of such citizenship. Each of such letters, however, fails to specify the date when, if ever, the Attorney General himself approved the renunciation and also fails to state that an order, at any specified time or ever, actually was issued by him approving the renunciation as not contrary to the interest of national defense. It is significant that an approval of a renunciation is a finding that a renunciant is not a danger to our security. It is strange that many of such applications were revoked by the signers prior to the time any attempted approval thereof was made and that the revoking letters were ignored by your Department.

Exhibit 1—(Continued)

The theory offered in justification of such internment, if I am correctly informed, is that an approved renunciation, provided it was executed and approved during time of war and possessed the attributes of constitutionality and legality, automatically converted the renunciant into an alien enemy and thereupon condemned him to internment as an alien enemy under the provisions of the Alien Enemy Act. The theory is novel and unprecedented to say the least. The most that can be said of such a renunciation is that a shedding of U. S. citizenship does not clothe the renunciant with foreign citizenship but leaves him stateless. Such a person, nevertheless, is an inhabitant of this country and is entitled to the protection of constitutional safeguards. There is neither constitutional nor statutory authority or precedent justifying the internment of such a person as an alien enemy under the provisions of the Alien Enemy Act.

None of the persons whose name appears on the attached list is an alien enemy and none at any time has been an alien enemy or an alien or a national or a citizen or a subject of any foreign, sovereign, government, power or nation. Each of said persons was born in the United States and ever since continuously has been and now is subject to the jurisdiction thereof and is a national of and a citizen of the United States, as provided by the 14th Amendment of the Constitution, and as such is entitled to all the rights, liberties, privileges and immunities

Exhibit 1—(Continued)

of national citizenship and to those rights secured to persons by the 5th Amendment of the Constitution.

As the attorney duly authorized to represent and representing each of said persons whose name appears on the attached and annexed list which is incorporated herein, and for and on behalf of each of them, I hereby withdraw, retract, rescind, revoke, cancel and annul each of said renunciations and renunciation forms executed by each of them upon the following grounds and for the following reasons, among other grounds and reasons, to-wit:

1. That the said renunciation was invalid and void in its inception and also in its execution and has never become and cannot become effective;

2. That neither an approval nor an order approving the said renunciation has been made or issued by the Attorney General of the United States and none possessing validity can be made;

3. That neither an approval nor an order approving the said renunciation can be made by a subordinate executive officer in the absence of a specific statutory authority having been lodged by Congress in the Attorney General of the United States to delegate such a discretionary authority to be exercised by any person;

4. That the provisions of 8 USCA, sec. 801(i), and regulations issued pursuant thereto, on their

Exhibit 1—(Continued)

face and also as construed and applied to each of said persons, are unconstitutional and void for being repugnant to the 5th, 6th, 9th, 10th and 14th Amendments and in contravention of the privileges and immunities secured to each of them by the provisions of Article IV, sec. 2, of the Constitution;

5. That the application of the provisions of 8 USCA, sec. 801(i), and regulations issued pursuant thereto, to each of said persons is in excess of congressional authority lodged in Congress by Article I of the Constitution and is void as being extra-constitutional;

6. That an approval of said renunciation form, if given, and the giving of notice thereof, were, and each of said things was, in fact and in law, contrary to the interests of national defense and also contrary to the sovereignty of the United States, and for each of said reasons is invalid and void;

7. At the time said renunciation form was signed and ever since then the renunciant, together with a member or members of his or her immediate family, was and still is held in duress, then and there being unlawfully imprisoned in the said Tule Lake Center, under a claim of color of official governmental authority, and being deprived of practically all his or her constitutional rights, liberties, privileges and immunities guaranteed to him or her as a citizen and national of the United States by birth and by choice and of practically all his or her rights as a

Exhibit 1—(Continued)

person secured by the Constitution. While thus imprisoned and held in duress renunciant was made the unwilling victim of fraud, menace and undue influence and was mistreated, discriminated against, harassed and oppressed solely by reason of the irrelevance of the nationality of his or her ancestors and their historical and geographical origin;

8. At the farcical hearing on said renunciation which, held under the aforesaid circumstances, was nothing but a perfunctory appearance, the hearing officer's recommendation thereon was based, either in whole or in part, upon secret information and data available to and used by the hearing officer but which was withheld and kept secret from renunciant, and the approval thereof and order approving said renunciation, if any ever was made, was wholly or partially based thereon and, therefore, is invalid and void as a deprivation of a fair and impartial hearing, in violation of the provisions of the 6th Amendment, and as a denial of due process of law, in violation of the provisions of the 5th Amendment;

9. That the United States government, acting by and through its officials, agents, servants and employees, as the guardian and custodian of the person of renunciant and of the persons of members of his or her immediate family, its wards, knowingly and deliberately took a gross advantage of renunciant who then and there was held in duress

Exhibit 1—(Continued)

and in a constant state of terror and subjected to menace, fraud and undue influence and deliberately deprived renunciant of the benefit of independent advice and counsel in and about the hearing on said renunciation and the execution of said renunciation form and failed to inform renunciant that a renunciation would result in his or her deportation to Japan. The authorities confining renunciant to said prison also recently commanded renunciant to register as an alien, under pain of punishment provided for violation of the Alien Registration Act of 1940 for refusal so to do, and also demanded of many renunciants a false declaration, in a non-repatriation application, to the effect that renunciant was a person of Japanese nationality or a dual citizen despite the fact said authorities then knew, as a matter of fact and of law, that renunciant was of United States nationality and not a dual citizen, and also refused to accept written protests against such registration and declarations;

10. The time, place and circumstances under which said renunciation form was signed by renunciant did not constitute a fair and impartial hearing or trial and, in fact and in law, constituted a denial of renunciant's constitutional guaranty of due process of law and of the equal protection of the laws, in violation of the provisions of the 6th and 5th Amendments of the Constitution and, in addition thereto, constituted an unconstitutional deprivation thereunder of all of those inalienable

Exhibit 1—(Continued)

rights of national citizenship and of persons flowing from the facts of birth and residence in this country and which inhere in and attach to renunciant;

11. That at the time said renunciation form was signed the renunciant was not a free agent in any sense of the words but, together with members of his or her immediate family, then and there was and for a long period of time prior thereto had been and still is unlawfully confined to a concentration camp and restrained of his or her liberty, under a claim of color of authority of the United States, albeit in the absence of crime upon his or her part and without a charge or accusation of crime having been lodged against him or her. Said renunciation was exacted from renunciant while he or she was held in duress by the government acting through its officials, agents, servants and employees and while renunciant was, by them, knowingly permitted to be subjected to the menace, fraud, undue influence and duress exerted and practiced upon him or her by the government and its agents and especially by organized terroristic groups and gangs of persons, and other individuals, who were confined to said Center, which groups had established and maintained a veritable reign of terror over the internees;

12. That said renunciation was neither free nor voluntary on the part of renunciant but was the

Exhibit 1—(Continued)

product of fear, torment and terror induced in renunciant's mind by virtue of the governmental duress in which renunciant then and there was held which operated to deprive renunciant of freedom of choice, will and desire in and about the execution of the same; and at the time renunciation hearings were being held in said Center the government and its agents led the internees to believe and since then has led them to believe, by word and conduct, that renunciations were not final but were subject to being withdrawn and cancelled, in like manner as requests for repatriation were subject to withdrawal and cancellation, and thereby lulled them into a false sense of security and also led them to believe that renunciations would not result in a renunciant's involuntary deportation to Japan and thereby also lulled them into a false sense of security;

13. That said renunciation was neither free nor voluntary on the part of renunciant but was the product of fear, torment and terror induced in renunciant's mind by virtue of the duress in which he or she then was held and by virtue of the duress, menace, fraud and undue influence practiced upon and exercised against renunciant and members of renunciant's immediate family by terroristic groups and gangs of disloyal, subversive and fanatical persons there actively engaged in developing and promoting loyalty to Japan, and by other individuals, likewise confined to said Center, who intimidated,

Exhibit 1—(Continued)

coerced and compelled renunciant to execute said renunciation form by threats, exhibitions and examples of physical violence against the person of renunciant and members of renunciant's family, all of which operated to deprive renunciant of freedom of choice, will and desire in and about the execution of the same. The truth of this is acknowledged in the letter of the Department of Justice dated January 18, 1945, addressed to the respective chairman of the Sokuji Kikoku Hoshi Dan and the Hokoku Seinen Dan at the Tule Lake Center, copies of which, at the instance of your Department, were posted promiscuously in the said Center;

14. Renunciant signed said renunciation form as a result of the duress, menace, fraud and undue influence to which he or she and renunciant's family confined to said Center constantly were subjected by the government, and its agents, as renunciant's jailor and custodian, and by the afore-said terroristic groups, gangs and individuals to whose studied and continuous campaign of terrorism and criminal oppression renunciant there helplessly was exposed and such renunciation was and is false, fictitious and void for each of said reasons;

15. That said renunciation was neither free or voluntary; the renunciant was compelled, intimidated and coerced into signing said renunciation

Exhibit 1—(Continued)

form by reason of threats of unlawful and violent injury to the person, property and character of renunciant and to members of renunciant's family, made by disloyal, subversive and dangerous pressure groups, gangs and individuals harbored and detained in said Center. These were freely allowed and permitted by the government, as the jailor and custodian of renunciant, to menace, intimidate, coerce and terrorize renunciant and many other loyal American citizens there confined, by oral means, by displays, shows, parades, demonstrations and exhibitions of force and violence, and by threats of inflicting great physical injury and loss of life upon renunciant and other loyal American citizens there confined, thereby compelling them involuntarily to execute such renunciations. The renunciant was in constant fear, as was his or her immediate family and other loyal internees, and believed and feared, as did members of his or her family, that said threats would be carried into execution if said renunciation was not signed. The renunciant was acting under the duress, menace, fraud and undue influence of said groups and gangs, and of other individuals confined to said Center, and by virtue thereof, signed said renunciation form under compulsion and in fear of said threats. The government failed to accord renunciant and said persons the protection against said lawlessness and terrorism although protection against the same was their due. It failed to halt or put a stop thereto

Exhibit 1—(Continued)

and thereby contributed to the mass hysteria and terroristic state in which they were held. Of all these facts your predecessor in office, the agents of your Department and the authorities in charge of said Center then were aware;

16. That at the time said renunciation application was signed renunciant had been informed and led to believe and believed, by virtue of said imprisonment, duress and the undue influence under which he or she was laboring, that it was a matter commanded by the government, compliance with which was a prerequisite to the right to remain in the protective security of said Center, as also to prevent a disuniting of renunciant's family. In addition, you are aware of the great number of overt and covert acts committed, the misrepresentations made by and the undue influence exercised over renunciant and other internees by the said terroristic pressure groups and gangs of disloyal, subversive and criminally inclined persons, likewise there confined, who compelled the applications to be signed. For a long time prior to the signing of said application, at said time and since such groups and gangs knowingly and recklessly were permitted by the government and its agents to engage in and carry on their continuous campaign of lawlessness and terror against renunciant and other loyal internees there confined and to establish and maintain a rule of terror over them. These groups and gangs were openly permitted and allowed to preach

Exhibit 1—(Continued)

and practice sedition, to terrorize the internees and to endeavor to proselyte to the cause of the enemy those loyal American citizens and aliens friendly to the United States there interned. They were permitted to and did menace, intimidate and coerce thousands of loyal and law abiding internees, by means of threats and resorts to demonstrations, exhibitions and examples of individual assaults and batteries and mob violence, into compelling renunciant and thousands of others to execute said renunciation form.

The government neither prevented nor stopped the said reign of terror. It afforded the internees neither help nor protection against it. It failed to prosecute the active leaders and members of said groups and gangs for the commission of such criminal acts. By reason of said rule of terror, which kept the internees in a constant state of mass hysteria, and in the absence of protection against the same being afforded by the government, many loyal and innocent but helpless internees were driven to become nominal but inactive members of such groups simply to save themselves and their families from danger, physical violence and probable loss of life from said sources;

17. Each of said persons was informed, by public announcements made by governmental authorities just prior to the time said renunciations were signed, and concurrently therewith, that his or her deportation to Japan, along with alien members of

Exhibit 1—(Continued)

his or her family, on an exchange ship, was imminent and impending and each and all of them, by said pressure groups and gangs active in said Center and members thereof, were threatened that if he or she failed to sign an application for renunciation the security of each and that of their families upon arrival in Japan would be endangered because the pro-Japanese leaders of said nationalistic pressure groups and gangs would report them to the Japanese government as being dangerous alien enemies to Japan and as American spies, in which said announcements and representations he or she and his or her family and other internees detained in said Center believed and feared would be the treatment accorded them all. Said groups and gangs maintained an elaborate system of black-listing and espionage over the internees in said Center as part of the program of systematic tyranny to which they subjected the internees;

18. At the time said renunciation was signed and for weeks prior thereto active leaders and members of said pressure groups threatened said persons and each of them that if any of them talked to, associated with or communicated with any of the Caucasians within or without said Center to whose charge they were committed or with any Caucasians there employed that such persons so doing would be assaulted by terroristic gangs sponsored by said pressure groups. Each of said persons believed in and feared and had good cause and reason to be-

Exhibit 1—(Continued)

lieve in and fear, that said threats against him or her would be carried into execution and that he or she and their families would be exposed to physical violence and probable loss of life if he or she failed to heed said threats and refused to obey the mandates of said pressure groups.

It may interest you to learn, although I presume you long ago must have been informed, that such pressure groups and gangs maintained, operated and conducted special coaching schools in the Center for the express purpose of coaching the helpless victims of their fraud, menace, deceit and undue influence upon the questions the hearing officers were to propound to them and the answers they were to give thereto at the scheduled hearings on the renunciation applications. You have been informed, I presume, that at least one loyal internee was murdered in said Center and that it does not seem ever to have been doubted by the internees and their custodians that the murderer was an active member of one of the terroristic groups operating therein and carrying out its mandate. You are aware that the government and its agents made little, if any, effort to suppress and none to isolate the active criminal members of such groups. You know that none of the leaders or active members of said groups and gangs were prosecuted criminally for their lawless acts. Had the federal sedition and espionage or other criminal laws been invoked against them their lawlessness would have been checked ;

Exhibit 1—(Continued)

19. In the event of a refusal to execute such a renunciation form the renunciant, together with renunciant's immediate family, was informed, believed and feared, by reason of said duress, intimidation and coercion, and by reason of representations made by said disloyal groups, gangs, and by other individuals confined to said Center, that renunciant and members of renunciant's family would be expelled and removed from the comparative security of his or her then prison and the custody of his or her then jailors and custodians and would be driven back, friendless, propertyless and protectionless, into civil life in a community highly prejudiced against and hostile to renunciant and renunciant's family because of their descent from persons of Japanese ancestry and there would be exposed to and suffer great bodily harm, injury and probable loss of life by virtue of existing mob violence and the criminal intentions of lawless individuals who regard all persons of Japanese descent as enemies upon whom they might with impunity inflict injury.

For the said reasons renunciant was led to believe and believed that if renunciant signed said renunciation form the renunciant, together with his or her family, would be permitted, allowed and entitled to remain in the relative security afforded by said Center, renunciant's jailors and custodians until such time as the war had terminated, peace had been restored and such community prejudice,

Exhibit 1—(Continued)

hostility and violence subsided and ceased. In the face of said threats and while held in duress and also acting upon said representations so made, the renunciant, under the circumstances aforesaid, believed and feared and had good cause to believe and to fear that if he or she failed to execute the renunciation form renunciant and renunciant's family would be driven from said Center and would be exposed to and would suffer great harm and physical violence from said lawless sources. These are facts and matters of common knowledge of which the renunciant's jailors, custodians, the then Attorney General and the Department of Justice and its agents well were aware.

The failure of the government and its authorities and agents to segregate and isolate and prosecute the rabid and dangerous leaders and active members of said groups and gangs who were fanatically loyal to Japan and serving the cause of our enemy and who then desired and still desire to be repatriated to Japan and who should be sent there, and through such a procedure effectively to prevent them from inoculating interned loyal American citizens and friendly aliens with the virus of disloyalty, despite the repeated pleas made for such relief and protection, is, in itself, ample proof of the abusive treatment suffered by renunciant and thousands of other internees loyal to the United States and of the duress in which renunciant and they unlawfully were held;

Exhibit 1—(Continued)

20. Nearly all the confined male citizens of draft age in said Center, including those who had served faithfully in our armed forces and held honorable discharges therefrom, and there were hundreds of these, and many others who were transferred, by the military authorities, from active duty to the enlisted reserves and who, with such status, are still subject to being called for active duty, were classified as "4-C" by draft boards acting upon instructions of the government. They were thus detained, treated and falsely classified as "alien enemies," that is to say, "4-C," without good cause, without justification and in violation of their rights as American citizens. By reason thereof, they were led to believe that the government of the United States regarded them not as citizens but as alien enemies. Said conduct upon the part of the government compelled them formally to make a fictitious renunciation of a citizenship of which each already, in fact, had been deprived by the government. Many of the renunciants who are confined to said Center repeatedly have tried to enlist in our armed forces but were denied the right to fight for and defend our country by prejudiced and hostile draft boards and by governmental authority and still are denied this birthright;

21. In approving renunciations, if any were approved, a gross discrimination against the family unity of the confined persons was practiced, the governmental objective being the deportation of

Exhibit 1—(Continued)

all renunciants. In accepting the renunciation of one member of a family and refusing another the government divides and disunites the families. The purpose of this was and is to cause a mass exodus of persons of Japanese ancestry from this country. It effectuates this purpose by compelling citizens who have not renounced to the hard choice of either remaining in this country separated from their wives, husbands, brothers, sisters, parents and children or being compelled to be the victims of a forced banishment necessitated to preserve family unity. Hundreds of our heroic soldiers of Japanese ancestry are returning from the battlefields of Europe and the Pacific to find their families divided, members thereof interned in the Center and themselves faced with such a distressing and terrible choice;

22. By reason of the 1942 evacuation from the western states and the subsequent prolonged detention of renunciant and persons of like ancestry in concentration camps the renunciant was driven into becoming a refugee from unjust racial discrimination, prejudice and hate. As a consequence of the mistreatment by the government and a hostile segment of the public, both regarding and treating renunciant and persons of like ancestry as being persons of an inferior and degraded race unworthy of social acceptance on a basis of equality, the renunciant and persons of like ancestry were ostracized and forced to accept refuge from

Exhibit 1—(Continued)

such discrimination, prejudice and hate by a retreat into the mass of persons of like ancestry held in confinement as if they were racial outcasts instinctively seeking refuge in inconspicuousness;

23. Many of the said persons whose names appear on the attached list, at the time of signing said renunciation, were minors under the age of 21 years and hence were laboring under a legal disability. Neither the provisions of the Nationality Act of 1940, as amended, nor any regulations issued pursuant thereto nor the provisions of any other statute or law authorizes a renunciation of U. S. Nationality by a minor under the age of 21 years. Neither under the provisions of 8 USCA, sec. 801(i), nor under the Nationality Regulations is there any authority lodged in the Attorney General or any executive officer to fix 18 years as the age of maturity for renunciation purposes. I wish to point out that there is no legal authority or precedent whatever for acceptance or approval of renunciations executed by persons laboring under legal disabilities. I draw your attention to the fact that not only have minors who signed renunciation forms received notice from your office that such were approved but that others who labored under legal disabilities also have received like notices. I direct your attention to the fact that it is a matter of common knowledge in and about the Tule Lake Center that one person who was hopelessly non compos mentis at the time of signing a renuncia-

Exhibit 1—(Continued)

tion application, upon which a letter issued from your office giving notice of approval thereof, shortly thereafter was hurried away to a State institution for the insane;

24. None of the persons whose name appears on the attached list is a citizen, subject or national of Japan. None of them owes any allegiance to Japan or any foreign sovereign, government, power or nation. None of them has ever had, held or given any such allegiance or acknowledged or recognized any such allegiance. None of them is an alien enemy. None of them is an alien. None of them holds or has at any time ever held or accepted any dual citizenship by any act upon his or her part. It is impossible that any of them at any time could have held any dual citizenship. None of them has at any time accepted or recognized his or her status as being that of a dualistic or pluralistic citizen, such a status being impossible as having been expressly disavowed by the provisions of Title 8 U.S. Code, sec. 800, and its predecessor statute, 8 U.S. Code, sec. 15. If any of said persons at said renunciation hearings or at any time during said confinement stated he or she was a dual citizen such a statement was a mutual mistake of law and also was a mistake of fact then known to be such by the hearing officer, the government and its agents at the time and the same, if made, was made solely by reason of the aforesaid duress and undue influence, and if any such statement was made at

Exhibit 1—(Continued)

any other time it was the product of hearsay, misinformation and guesswork and was a mistake of fact. You are aware that many of the internees at said Center took affirmative steps, prior to the time of evacuation from the west coast, to cancel a dual citizenship they never possessed;

25. I direct your attention to the fact and principle of law that a minor or other person who is under a legal disability and hence is not *sui juris* could not be bound by a futile registration made by parents which may have been misunderstood by them to confer such a status. As a matter of fact and of law none of the persons whose names appear on the attached list, of whom many are under the age of 21 years, has at any time whatever held, accepted or recognized any citizenship or allegiance to any country or nation save and except that in and to the United States. Each of them recognizes but one sovereign and that sovereign is the United States to which each ever has given his or her undivided loyalty and allegiance. Unfortunately none of them was given an opportunity to demonstrate his or her loyalty affirmatively—imprisonment and mistreatment prevented such demonstration.

V-E Day is long behind us. V-J Day has come and passed. The war long has been over, Mr. Attorney General. The detention even of alien enemies is not now authorized by the Alien Enemy Act which is operative only during wartime and

Exhibit 1—(Continued)

can no longer be justified thereunder. It cannot be asserted with any degree of truth whatever that the Alien Enemy Act may lawfully be invoked to confine citizens, stateless persons or aliens. There now exists no legitimate reason or ground why even alien enemies long resident in this country and not hostile thereto should be confined to an internment camp. There is absolutely no reason or ground that can be offered in justification for the present detention and internment of the persons whom I represent and whose names appear on the attached list whether you view them either as citizens or as stateless persons.

Inasmuch as duress, menace, fraud, mistakes of law and fact, and undue influence caused the execution of the renunciation form on the part of each of the persons whose name appears on the attached list, of which facts you and officers of your Department have knowledge, you are empowered to accept the revocation and cancellation thereof and to withhold, withdraw and revoke any acceptance or approval of each of them, if any such acceptance ever was made or approval ever was given in any case. You are also empowered and authorized to order the release and discharge of each of said persons from internment. Each of said persons demands such a release and discharge from the custody in which he or she now is held by agents acting under your authority, direction and control.

These renunciants whom I represent are long-

Exhibit 1—(Continued)

suffering citizens. They have submitted to grosser indignities and suffered greater losses of rights and liberties than any other group of persons during the entire history of the nation, all without good cause or reason. They have been misunderstood, slandered, abused and long have been held up to public ridicule, shame and contempt. The mistreatment was initiated by an unjustified evacuation from the west coast, was intensified by imprisonment in a concentration camp for over three years, with all the attendant suffering and misery this entailed, and now these internees, faced with a loss of citizenship rights, are confronted with a threatened involuntary deportation to Japan, a country and nation to which they owe no allegiance, which has no claim upon them and with which they are not familiar. It is time this whole pernicious program of oppression was terminated. It is time the exercise of arbitrary and capricious power over them should cease. The damage done them cannot be repaired but further injury can be stopped. You have the right and the power to call halt to this program. You can prevent further mischief being done and thereby alleviate the misery these unfortunate people endure.

In the event that you fail to take immediate action on the foregoing demands each of the persons whose name appears on the attached list, having no alternative save so to do, will institute such legal proceedings as may be lawful and of which

Exhibit 1—(Continued)

he or she may be advised to effectuate the cancellation of his or her aforesaid renunciation form and renunciation of U. S. nationality, to prevent his or her deportation to Japan, to terminate his or her internment and to obtain release from the present restraint upon his or her liberty and to obtain whatsoever other redress law or equity may afford.

Yours very truly,

/s/ WAYNE M. COLLINS,

As Attorney for Each of the Persons Whose Name
Appears on the Attached and Annexed List of
Names.

Duplicate originals to:

State Department, Washington, D. C.

Alien Property Custodian, Washington, D. C.

Foreign Funds Control Section of the Treasury
Department, Washington, D. C.

Federal Bureau of Investigation, Washington,
D. C.

Immigration and Naturalization Service of the
Department of Justice, Washington, D. C.

Officer in Charge, U. S. Department of Justice
Immigration and Naturalization Service, Tule Lake
Center, Newell, Modoc County, California, said Of-

Exhibit 1—(Continued)

ficer in Charge presently being Ivan Williams, Tule Lake Center, Newell, Modoc County, California.

“TADAYASU ABO, et al., . . . , adults, individually, and as constituting a class, and as representatives of a class,

and

GENSHYO AMBO, et al., . . . , minors, individually, and as constituting a class, and as representatives of a class, by Harry Uchida, as the next of friend and as guardian ad litem of them and each of them, Applicants and Petitioners.”

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN
SUPPORT OF PETITION

I.

Where a person claims to be a citizen of the United States he cannot be deported without a judicial hearing first being had thereon.

Ng Fung Ho v. White, 259 U.S. 276.

Petitioners claim citizenship by birth in this country under the 14th Amendment and Title 8 USCA, sec. 601(a) and that the renunciations are void, ineffectual and should be set aside.

Deportation without a fair and impartial hearing is a denial of due process of law forbidden by the 5th Amendment.

Bridges v. Wixon, 323 U.S. 709.

II.

Treason is a constitutional crime, consisting, among other things, of "adhering" to the Enemies of the United States. U.S. Constitution, Art. III, sec. 3. Treason cannot be authorized by Congress. (Where agents of the government take the initiative to induce acts, which otherwise would be criminal, the action constitutes entrapment.)

Woo Wai v. U.S. (CCA-9), 223 Fed. 412.

Title 8 USCA, sec. 801(i) is void on its face and as applied herein for being in violation of the Constitution, Art. III, sec. 3, authorizing treason.

III.

A renunciation of nationality by a native-born American does not convert the renunciant into an alien enemy or an alien but renders him a stateless person and an inhabitant of this country. Such a renunciation would not in any event make such a person subject to removal or deportation under the provisions of the Alien Enemy Act, 50 USCA, sec. 21, et seq., or to deportation under any other statute. A stateless person is entitled to due process of law under the 5th Amendment as a "person" and is not subject to detention or removal under the Alien Enemy Act. Even the existence of a state of war does not suspend the provisions of the 5th and 6th Amendments.

U.S. v. L. Cohen Grocery Co., 255 U.S. 81.

IV.

Title 8 USCA, sec. 801(i), is void for containing

an unconstitutional delegation of legislative power to the Attorney General of the United States. (*Field v. Clark*, 143 U.S. 649, 692.)

Title 8 USCA, sec. 801(i), is void for uncertainty and for delegating to the Attorney General as an executive officer a discretionary authority without having set up any standards, guides or policies to which he is to conform. Such a delegation of legislative power is unconstitutional as forbidden by Art. I of the Constitution.

Panama Refining Co. vs. Ryan, 293, U.S. 388;
Schechter Poultry Corp. vs. U.S., 295 U.S.
495.

V.

A person under twenty-one (21) years of age cannot renounce citizenship in the absence of a clear and unambiguous statutory authorization. "Rights of citizenship are not to be destroyed by an ambiguity."

Perkins v. Elg., 307 U.S. 325, 337.

Title 8 USCA, sec. 801(i), lodges no power in the Attorney General to approve renunciations of persons under 21 years of age. (Title 8 USCA, sec. 803(b), merely states that persons under 18 years cannot be expatriated under the conditions therein specified—nothing more.)

VI.

The Alien Enemy Act, 50 USCA, sec. 21 et seq., authorizes the detention and removal of hostile alien enemies during the actual time of war, not before

or afterward; and even an alien enemy is deportable in wartime only after judicial hearing in which his rights first are determined. 50 USCA, sec. 23.

VII.

A loyal citizen cannot be detained.

Ex parte Endo, 65 S.Ct. 208.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Petitioners.

[Title of District Court and Cause.]

ORDER APPOINTING NEXT OF FRIEND
AND GUARDIAN AD LITEM FOR MINOR
APPLICANTS AND PETITIONERS

Upon reading and filing the verified application and petition for Writ of Habeas Corpus herein, and on the motion of Wayne M. Collins, Esq., attorney for applicants and petitioners, and good cause appearing therefor,

It Is Ordered That the minors named in the above-named cause be and each of them is hereby authorized to appear herein by Harry Uchida as his or her next of friend and as guardian ad litem of them and each of them.

Dated: November 13, 1945.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Nov. 13, 1945.

[Title of District Court and Cause.]

STIPULATION

Whereas, the respondent Ivan Williams, in habeas corpus proceedings No. 25296 and No. 25297 filed herein on November 13, 1945, which have been consolidated for hearing and trial purposes under No. 25294, herein with equity proceedings No. 25294 and No. 25295 involving the identical plaintiffs who are named applicants and petitioners in said habeas corpus applications and petitions, and the Attorney General of the United States and the United States District Attorney for this District, as his representatives, desire that the orders to show cause issued in said proceedings Nos. 25296 and 25297 on November 13, 1945, be continued from the return date of December 10, 1945, and be made returnable before the above-entitled Court on January 10, 1946, and whereas applicants and petitioners in said habeas corpus proceedings consent thereto,

It Is Hereby Stipulated between applicants and petitioners and the respondent Ivan Williams in said habeas corpus proceedings Nos. 25296 and 25297 that the hearing of the orders to show cause heretofore issued therein directed to respondent Ivan Williams may be continued from December 10, 1945, to January 10, 1946, and be made returnable before the above-entitled Court on said January 10, 1946, and that the orders therein contained ordering the said respondent to retain the custody of said petitioners and each of them within the

jurisdiction of this Court until its further order in said proceedings shall remain in full force and effect and shall be included in any continuance order to be granted respondent by the Court upon this stipulation consenting to the continuance of the hearings of the said orders to show cause to said January 10, 1946;

And It Is Further Stipulated that the respondent will retain the custody of the applicants and petitioners and each of them within the jurisdiction of the above-entitled court until said January 10, 1946, and thereafter until the further order of the said Court; and it also is stipulated that neither a copy nor a duplicate original of this stipulation nor of the order of this Court continuing the hearing on said orders to show cause or either of them need be personally served upon respondent Ivan Williams by applicants and petitioners, the undersigned attorneys for said respondent consenting to acknowledge service thereof for said respondent.

Dated: November 23, 1945.

/s/ WAYNE M. COLLINS,

Attorney for Applicants and
Petitioners.

TOM C. CLARK,

Attorney General of the U. S.
FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,

Assistant U. S. Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Nov. 23, 1945.

[Title of District Court and Cause.]

ORDER

Upon reading and filing the written stipulation dated November 23, 1945, entered into by the parties in the above-entitled proceedings consenting that the hearing of the order to show cause heretofore issued herein and directed to the respondent Ivan Williams may be continued to January 10, 1946.

It Is Ordered that the hearing of the Order to Show Cause heretofore issued herein on November 13, 1945, be continued to January 10, 1946, for hearing, and that the respondent Ivan Williams shall retain the petitioners in the said proceeding and each of them within the jurisdiction of this Court until this Court's further order herein.

Dated: November 23, 1945.

/s/ A. F. ST. SURE,

U. S. District Judge.

Service of copies of the above order is hereby acknowledged by the Respondent, Ivan Williams, and his counsel this 23rd day of November, 1945.

IVAN WILLIAMS,

Respondent.

By TOM C. CLARK,

Attorney General of U. S.

And

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ ROBERT B. McMILLAN,

Assistant U. S. Attorney,

Attorneys for Respondent.

[Endorsed]: Filed Nov. 23, 1945.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the verified petition for Writ of Habeas Corpus herein, and good cause appearing therefor.

It Is Ordered That the respondent, Ivan Williams, as the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, Tule Lake Center, Newell, Modoc County, California, appear before this Court on the 10th day of December, 1945, Department, Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 10:00 o'clock A.M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein for each and all of the petitioners named in the petition and why the relief prayed for in the said petition should not be granted and the petitioners and each of them be restored to his or her liberty, and that a copy of this Order be served upon said respondent, and a copy of the petition and this

order be served upon the United States Attorney for this District, his representative herein;

And It Is Further Ordered that the said respondent who now has the custody of said petitioners shall retain the said petitioners and each of them within the jurisdiction of this Court until its further order herein.

Dated: November 13, 1945, San Francisco, California.

A. F. ST. SURE,
U. S. District Judge.

Marshal's copy.

Received U. S. Marshal's Office, S. F., Calif., Nov. 13, 1945.

Original filed Nov. 13, 1945, U.S.D.C.

Return on Service of Writ

United States of America,
Northern Division of California—ss.

I hereby certify and return that I served the annexed Order to Show Cause on the therein-named Ivan Williams, as the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, Tule Lake Center, Newell, Modoc County, California, by handing to and leaving a true and attested copy thereof with copy of Petition for Writ of Habeas Corpus at-

tached, with Ivan Williams personally at Tule Lake in said District on the 14th day of November, 1945.

26777/25296-R

GEORGE VICE,
U. S. Marshal.

By /s/ WARREN D. CAIN,
Deputy.

Return on Service of Writ

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Order to Show Cause on Tom Clark, as Attorney General of the United States, by mailing by registered mail—a true and correct copy thereof with copy of Petition for Writ of Habeas Corpus attached, to Tom Clark, Attorney General of the United States at Washington, D. C., on the 13th day of November, 1945.

26777/25296-R

GEORGE VICE,
U. S. Marshal.

By /s/ WARREN D. CAIN,
Deputy.

Return on Service of Writ

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Order to Show Cause on Frank J. Hennessey, United States Attorney for the Northern District of California by handing to and leaving a true and correct copy thereof with copy of Petition for Writ of Habeas Corpus attached, with Frank J. Hennessey, United States Attorney, personally at San Francisco in said District on the 13th day of November, 1945.

26777/25296-R

GEORGE VICE,

U. S. Marshal.

By /s/ WARREN D. CAIN,

Deputy.

[Endorsed]: Filed Nov. 28, 1945.

[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas the Attorney General of the United States, through the instrumentality of the United States Department of Justice, a federal agency, as also the respondent herein, his agent, contemplates and intends to conduct "mitigation-hearings" of persons asserted to be renunciants of United States nationality who are detained in the custody of the respondent at the Tule Lake Center, Newell, Modoc

County, California, and of certain other asserted renunciants detained under his authority at the Fort Lincoln Detention Camp at Bismarck, N. D., and at the Alie nInternment Camp at Santa Fe, New Mexico, and including the petitioners named in the above-entitled proceeding who are detained in custody of the respondent at said Tule Lake Center and also those similarly detained persons who, from time to time, may be joined and included as petitioners in said class action or proceeding, and

Whereas at said such hearings which are expected to be commenced during the month of January, 1946, such asserted renunciants are to be given an opportunity to show cause why they should not be deported to Japan by the said Attorney General, and

Whereas it is agreed by the parties hereto and said Attorney General that such petitioners shall not file individual written statements on any applications for any such mitigation hearings or be required to make oral statements at such hearings reserving their rights which would increase to an enormous extent the paper work of the examiners who are to conduct such hearings and absorb an unusual amount of their time,

It Is Stipulated between the parties hereto and said Attorney General that neither the application of any of said such petitioners to have such mitigation hearings nor their submission thereto shall operate as or constitute a waiver of any constitu-

tional, statutory or other legal rights or remedies asserted in the above entitled proceeding by any applicant or petitioner nor shall the same in any-wise bar or prejudice their right to maintain said proceeding.

Dated: December 31, 1945.

/s/ WAYNE M. COLLINS,

Attorney for Applicants and
Petitioners.

TOM CLARK,

Attorney General of U. S.

IVAN WILLIAMS,

Respondent.

By FRANK J. HENNESSY,

U. S. Attorney.

By /s/ [Illegible.]

Assistant U. S. Attorney.

Attorneys for Respondent.

So Ordered: December 31, 1945.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Dec. 31, 1945.

[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas the Attorney General of the United States, through the instrumentality of the United States Department of Justice, a federal agency, as

also the respondent herein, his agent, contemplates and intends to conduct "mitigation-hearings" of persons asserted to be renunciants of United States nationality who are detained in the custody of the respondent at the Tule Lake Center, Newell, Modoc County, California, and of certain other asserted renunciants detained under his authority at the Fort Lincoln Detention Camp at Bismarck, N. D., and at the Alien Internment Camp at Santa Fe, New Mexico, and including the petitioners named in the above-entitled proceeding who are detained in custody of the respondent at said Tule Lake Center and also those similarly detained persons who, from time to time, may be joined and included as petitioners in said class action or proceeding, and

Whereas at said such hearings which are expected to be commenced during the month of January, 1946, such asserted renunciants are to be given an opportunity to show cause why they should not be deported to Japan by the said Attorney General, and

Whereas it is agreed by the parties hereto and said Attorney General that such petitioners shall not file individual written statements on any applications for any such mitigation hearings or be required to make oral statements at such hearings reserving their rights which would increase to an enormous extent the paper work of the examiners who are to conduct such hearings and absorb an unusual amount of their time,

It Is Stipulated between the parties hereto and said Attorney General that neither the application of any of said such petitioners to have such mitigation hearings nor their submission thereto shall operate as or constitute a waiver of any constitutional, statutory or other legal rights or remedies asserted in the above entitled proceeding by any applicant or petitioner nor shall the same in anywise bar or prejudice their right to maintain said proceeding.

Dated: December 31, 1945.

/s/ WAYNE M. COLLINS,
Attorney for Applicants and
Petitioners.

TOM C. CLARK,
Attorney General of U. S.
IVAN WILLIAMS,
Respondent.

By FRANK J. HENNESSY,
U. S. Attorney.

By /s/ WILLIAM E. LICKING,
Assistant U. S. Attorney.
Attorneys for
Respondent.

So Ordered: December 31, 1945.

/s/ A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Dec. 31, 1945.

[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas the Attorney General of the United States, through the instrumentality of the United States Department of Justice, a federal agency, as also the respondent herein, his agent, contemplates and intends to conduct "mitigation-hearings" of persons asserted to be renunciants of United States nationality who are detained in the custody of the respondent at the Tule Lake Center, Newell, Modoc County, California, and of certain other asserted renunciants detained under his authority at the Fort Lincoln Detention Camp at Bismarck, N. D., and at the Alien Internment Camp at Santa Fe, New Mexico, and including the petitioners named in the above-entitled proceeding who are detained in custody of the respondent at said Tule Lake Center and also those similarly detained persons who, from time to time, may be joined and included as petitioners in said class action or proceeding, and

Whereas at said such hearings which are expected to be commenced during the month of January, 1946, such asserted renunciants are to be given an opportunity to show cause why they should not be deported to Japan by the said Attorney General, and

Whereas it is agreed by the parties hereto and said Attorney General that such petitioners shall

not file individual written statements on any applications for any such mitigation hearings or be required to make oral statements at such hearings reserving their rights which would increase to an enormous extent the paper work of the examiners who are to conduct such hearings and absorb an unusual amount of their time,

It Is Stipulated between the parties hereto and said Attorney General that upon applying for or submitting to such a mitigation hearing each petitioner in the above entitled proceeding shall be deemed to have objected to such hearing upon the grounds that he or she is a native born citizen of the United States and not subject thereto, and that he or she does not intend the same to operate as or constitute a waiver of any constitutional, statutory, or other legal right or remedy asserted in the above entitled proceeding by him or her, or in any wise to bar or prejudice his or her right to maintain said proceeding.

It Is Further Stipulated that the stipulation dated December 31, 1945, executed by William E. Licking for respondent, and the order of Court made thereon and filed herein on December 31, 1945, be vacated and set aside.

Dated: January 2, 1946.

/s/ WAYNE M. COLLINS,

Attorney for Applicants and
Petitioners.

TOM C. CLARK,

Attorney General of U. S.

IVAN WILLIAMS,

Respondent.

By /s/ FRANK J. HENNESSY,

U. S. Attorney.

By /s/ ROBERT B. McMILLAN,

Assistant U. S. Attorney,

Attorneys for Respondent.

So Ordered: January 2, 1946.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Jan. 2, 1946.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Stipulated between the parties hereto that the Order To Show Cause heretofore issued and made returnable herein on January 10, 1946, may be continued on the court's calendar and be returnable on February 11, 1946, for hearing, and that the respondent Ivan Williams shall retain the petitioners in said proceeding and each of them within the jurisdiction of this Court until this Court's further order in said proceeding.

Dated: January 2, 1946.

/s/ WAYNE M. COLLINS,

Attorney for Petitioners.

TOM CLARK,

Attorney General of U. S.

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ ROBERT B. McMILLAN,

Assistant U. S. Attorney.

Attorneys for

Respondent.

So Ordered: January 2, 1946.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Jan. 2, 1946.

[Title of District Court and Cause.]

SUPPLEMENT AND AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Come the petitioners in the above-entitled proceeding, supplementing and amending the petition for writ of habeas corpus herein by the following allegations to be added to Paragraph VI (A)(4) of said petition, immediately following the matter ending on line 25 of page 16 of said Petition For Writ of Habeas Corpus, to-wit:

* * *

(c) The pressure groups and gangs, mentioned in paragraph VI of said "Petition for Writ of Habeas Corpus," originated in said Tule Lake Center in 1944 as a Japanese educational and cultural movement sponsored and fostered by the War Relocation Authority, a federal executive agency

to the charge of which the evacuees in said Center, including all the petitioners herein, were committed; said movement, then and thereafter until all the renunciation forms therein mentioned had been signed and pseudo-hearings held thereon, was conducted with the full knowledge and consent of said agency and under the eyes of its officers, agents and employees; said movement developed into a racket cast in the form of an innocuous appearing "innocents front" organization; thereafter, by its organizers, leaders and controllers, a majority if not all of whom were aliens of Japanese nativity, it was converted into a pro-Japanese nationalistic movement; at the time of said renunciation hearings it had developed into and was an active terroristic movement controlled by a leadership of such aliens whose design, purpose and actions gave such direction thereto and compelled in excess of eighty (80%) per cent of the total number of citizen prisoners over 18 years of age there confined who signed renunciation applications, included in which percentage is each petitioner herein, to sign applications for renunciation of U. S. nationality, all as admitted by the Government and therefore by respondent in Exhibit "2" attached hereto and made a part hereof; that the real nature, purposes and bent of said movement, under such leadership, was concealed from its inactive members who had joined it when it appeared to them to be a simple educational and cultural movement as aforesaid, and when its true nature and purposes had not been re-

vealed and were not discernible; that when the true nature and purposes thereof became apparent many members thereof did not dare to protest the course thereof or openly resign therefrom because of the coercion of said groups and gangs and for fear their own personal security and the security of members of their families thereby would be endangered, and many persons confined to said Center, including some of the petitioners herein, were compelled to join the same as inactive members for like security reasons while acting in fear of said groups and gangs by reason of said coercion and while held in duress by them.

(d) That while the aforesaid campaign of terror was reigning at said Tule Lake Center and as the proximate result thereof 5,371 native-born Americans over 18 years of age, among whom are each of the petitioners, executed applications for renunciation of United States nationality; that in excess of 5,346 of said native-born Americans, including each of the petitioners, did so as the direct and proximate result of and by virtue of the duress in which they then and there and for a long period of time prior thereto had been held by the United States Government, its agents, servants and employees and particularly by the War Relocation Authority aforesaid, and by virtue of the fraud, menace and undue influence of the aforesaid groups and gangs operating therein and the duress in which they were held by said groups and gangs and against which the United States Government, its

agents, servants and employees and particularly the War Relocation Authority gave the petitioners no protection but openly allowed and therefore aided, abetted and participated in;

That the United States Government, by and through the Department of the Interior and the Secretary of the Interior as the head of the War Relocation Authority to whose charge petitioners and all prisoners confined in said Tule Lake Center were committed at the time of said renunciations, through the Under Secretary of the Interior, on August 6, 1945, made an executive finding in writing, admitting and publishing therein the fact that it was "primarily due" to the undue influence, fraud, menace and duress practiced upon the evacuees detained in said Center by the aforesaid groups and gangs that caused renunciation applications to be signed by "over 80% of the citizens" there confined who were deemed eligible to renounce U. S. nationality; that a photostat copy of said writing is attached hereto, made a part hereof and is marked Exhibit "2"; that the responsibility for and the cause of in excess of 5,346 of said 5,371 total of said renunciations rests with the War Relocation Authority to which agency the immediate charge of said persons in said Center was committed for carrying into execution the policy adopted by it and under which it sponsored and fostered the cultural movement aforesaid and permitted the diversion thereof into the terroristic movement aforesaid and for its failure and refusal to take precaution-

ary measures to prevent such rule of terror and to protect the petitioners from harm and to safeguard their rights as American citizens;

(e) Shortly after the time the said applications for renunciation had been signed at said Center by the petitioners the government of the United States, acting by and through the War Relocation Authority, and its agents, suddenly formulated and carried into execution the following program and policy, to wit:

It seized all the organizers, leaders and active members of the aforesaid pro-Japanese nationalistic pressure groups and gangs, the great majority of whom were aliens of Japanese nativity, along with many other aliens and native-born Americans of Japanese ancestry then confined to said Center and who were harmless and innocent of any wrong doing and who never at any time were hostile or dangerous to our security or to the security of any person in said Center, and forcibly removed them to internment camps situated in Bismarck, N. D., Santa Fe, N. M., and Crystal City, Texas, from whence all of the organizers, leaders and active members and persons then of disloyal bent thereafter and since the filing of this petition were voluntarily repatriated to Japan by the U. S. Government; in addition to said persons so repatriated, a number of native-born Americans and alien Japanese innocent of wrong doing voluntarily repatriated to Japan therefrom because of their aforesaid long mistreatment of this government, in-

cluding among them a number of American nationals, renunciants and inactive members of said pressure groups who were subject to the undue influence of and under the duress of said groups and gangs and whose repatriation was due to the undue influence and duress thereof; that in excess of 8000 persons of Japanese ancestry have been repatriated to Japan from said Center and camps; that in excess of twenty (20%) per cent of the renunciants originally confined to said Center who signed said renunciation applications have since then been repatriated to Japan from said Tule Lake Center, the Fort Lincoln Internment Camp at Bismarck, North Dakota, the Alien Internment Camp at Santa Fe, New Mexico, and the Alien Internment Camp at Crystal City, Texas;

All the renunciants, including petitioners, who have not been repatriated or deported to Japan are either persons who never were members of or associated with the aforesaid pressure movement, groups and gangs or are persons who resigned from said movement upon learning the true character and purposes thereof and who did not participate in or sympathize with the unlawful and wrongful acts and purposes thereof or who were forced to join the same to avert danger to themselves or members of their families and who resigned therefrom or ceased to have connection with the same upon learning the true nature and character thereof;

That while the petitioners were in the aforesaid Tule Lake Center they, as also those who later

were incarcerated in Bismarck and Santa Fe, constantly were subjected to the surveillance, menace, fraud and undue influence of said leaders of said movement, which was carried over into the said Camps at Bismarck and Santa Fe by leaders and active members thereof who had been transported thereto, as aforesaid, and who there established and carried on a like reign of terror over the persons there confined; that said menace, fraud and undue influence and duress did not abate until the Government initiated its program of voluntary repatriation to Japan and did not cease until all the leaders thereof in said Center and Camps had been repatriated subsequent to the filing of this suit;

(f) That the pseudo-hearings conducted by the Government on the renunciation applications at said Center were arbitrary, unreasonable and oppressive and petitioners thereat were deprived of the benefit of and the assistance of counsel, as aforesaid; that at the "mitigation-hearings" conducted after the filing of this suit at the Tule Lake Center, the Fort Lincoln Internment Camp at Bismarck and the Alien Internment Camp at Santa Fe, during January and February of 1946, at which the petitioners were ordered by the Attorney General of the United States to show cause why they by him should not be deported to Japan, each was arbitrarily subjected to such examination or hearing by said Attorney General and was denied the right and opportunity to be represented thereat by their counsel; that said hearings, in truth and in fact,

were pseudo-hearings in which the petitioners summarily were scheduled for such examinations before hearing officers, appointed by the Attorney General, without reasonable time or opportunity to prepare therefor or to obtain witnesses or evidence in their behalf; that neither petitioners nor witnesses thereat were sworn; that the hearings were unduly brief; that neither the opportunity nor the privilege of inspection of any evidence or evidence adverse to them was afforded petitioners nor was any adverse evidence offered against them; that at said hearings, as also upon a review of the recommendations of such hearing officers by the Attorney General and his reviewing staff thereon, said hearing officers, the Attorney General and his said reviewing staff, in refusing to recommend many petitioners for release from detention and to release them therefrom, considered and gave controlling weight to secret information contained in files maintained by such officers which was never made known to said petitioners and was not introduced into evidence at said hearings against them, and based such refusals upon whim and caprice; that at said fictitious administrative hearings, as also at the pseudo-hearings on the renunciation applications aforesaid, the hearing officers or examiners exacted statements and evidence from said petitioners and used information from their own secret dossiers against them as part of the systematic duress in which the government long had held and then was holding petitioners; that no evidence of

an adverse character was adduced at said hearings against any petitioners or that in anywise showed or tended to show any petitioner was hostile or dangerous to the security of this country; that said hearings were arbitrary, unreasonable and oppressive in character and wholly unfair and impartial and in violation of the 5th Amendment's guaranty of due process of law.

(g) That at said Tule Lake Center during October, 1945, and ever since then, and on in excess of twenty (20) occasions, the said War Relocation Authority has made recordings of the long distance telephone conversations had between said Center and San Francisco between petitioners and their counsel concerning their rights and the progress of this suit and has published the same despite the fact that the same was and is an interference with the privilege communication relationship existing between petitioners and their said counsel, and interference with their right of privacy and a denial of their right to counsel and a deprivation of their rights safeguarded by the 4th and 5th Amendments; that said practice upon the part of said War Relocation Authority has been and is a part of the generalized duress in which the petitioners have been and are held by the Government;

(h) Prior to the time of the aforesaid renunciation hearings the U. S. Government, through the War Relocation Authority, set up at the Tule Lake Center a special jail, termed "The Stockade," within the limits of said prison or concentration camp

wherein, without cause, it "incarcerated" innocent citizens, detained in said Center, without accusation of crime or wrong-doing on their part and without hearings on the cause therefor at any time having been afforded them and without allowing them the assistance of counsel and there held hundreds of them incommunicado for various periods of time ranging from a few hours to 360 days, all without cause; that said practice was designed to instil and did instil in the prisoners-evacuees confined to said Center an unwholesome fear of the arbitrary governmental power wielded over the evacuees confined to said Center and was a part and phase of the generalized campaign of duress in which the Government held the residents of said Center and said practice was continued during the time of said renunciation hearings and thereafter; that in August, 1944, the threat of filing habeas corpus petitions for fourteen (14) persons, and in August, 1945, the filing of five (5) petitions in this Court for writs of habeas corpus for five persons, succeeded in liberating the total nineteen residents of said Center then unlawfully jailed in said Stockade.

(i) That as part of the Government's systematic program of duress in which it held the petitioners and all residents in said Center the War Relocation Authority set up, established and maintained for the past four years a slavery and peonage system at said Center; in furtherance of this oppression it organized in said Center what is known as the

“Recreation Club” for the private and personal benefit of the Caucasian employees of said War Relocation Authority who were members thereof and through such an instrumentality deliberately exploited persons of Japanese ancestry confined to its charge; pursuant thereto members thereof paid into said Club the sum of \$30.00 per month and the said Club thereupon hired out to such member one of the internees to serve such member in private employment in the capacity of a slave or peon, either as house-maid, domestic, servant, cook, janitor, waitress, mess-attendant or in another menial capacity, and paid such person therefor either the sum of \$16.00 or \$19.00 per month, depending upon the character of the service, for labor performed on a forty (40) hour week basis, the remainder of the \$30.00 being retained by said Club with the exception of \$3.75 which the War Relocation Authority required the Club to pay such slave as a clothing allowance; that hundreds of the prisoners confined to said camp were thus exploited under this elaborate system of slavery and peonage maintained at said Center, all in violation of the provisions of the 13th and 5th Amendments of the Constitution.

(j) On December 17, 1944, effective as at January 2, 1945, General H. Pratt, Major General, U. S. A., in command of the Western Defense Command and Fourth Army, promulgated Public Proclamation No. 21 which revoked the 108 mass “civilian exclusion orders” theretofore issued by

Lt. General John L. DeWitt, his predecessor in said command, and revoked the restrictions theretofore placed upon petitioners and all persons of Japanese ancestry affected thereby and said proclamation was an executive judgment and based upon executive findings that none of the persons affected thereby, including the petitioners herein, was hostile or dangerous to the security of the United States of America;

On September 4, 1945, said General Pratt, as such military commander, promulgated Public Proclamation No. 24 which rescinded "all Individual Exclusion Orders in Effect" as of that date and removed all military prohibitions against the entry and presence of all persons affected thereby within the West Coast Exclusion Zone, and said proclamation was an executive judgment and based upon executive findings that none of the persons against whom individual exclusion orders theretofore had issued, including any petitioner herein if any such order prior thereto had issued against him or her, was hostile or dangerous to the security of the United States of America.

Wherefore, petitioners pray for the judgment and relief prayed for in the petition for writ of habeas corpus herein.

Dated February 23, 1946.

/s/ WAYNE M. COLLINS,

Attorney for Petitioners.

GOVERNMENT'S EXHIBIT No. 2

United States Department of the Interior
Office of the Secretary
Washington

Mr. Ernest Besig,
Director, Northern California Branch,
American Civil Liberties Union,
216 Pine Street,
San Francisco 4, California.

My dear Mr. Besig:

This is in further reply to your letters of July 6 and July 17 concerning detentions at Tule Lake for violation of the special project regulations prohibiting Japanese nationalistic activities. We have completed our investigation and in this letter I shall report rather fully our findings and conclusions.

Basically there are, I believe, three points that concern you: (1) the need for and hence the reasonableness of the special project regulations, (2) the apparent lack of any limitations upon the discretion of the Project Director in enforcing the regulations, and (3) an apparent abuse of authority in imposing certain sentences involving minors. I should like to take up each of these points in turn.

1. When Tule Lake became a segregation center, WRA adopted a policy of permitting evacuees to operate Japanese language schools and engage in Japanese cultural activities, in recognition of

the fact that many of the residents sincerely desired repatriation to Japan and that their children should be given an opportunity to become acquainted with Japanese culture. Unfortunately this policy was utilized as an entering wedge by a number of strongly pro-Japanese evacuees for the formation of virulently pro-Japanese nationalistic organizations. These evacuees were motivated chiefly by the desire to attain standing in the eyes of the Japanese government and obtain positions of leadership in the colony. To this end they instituted Japanese-type military drill, mass exercises, bugling, wearing of Japanese insignia, emperor worship ceremonials, pro-Japanese demonstrations, and other purely Japanese nationalistic activities designed not to serve any cultural purposes but to instill in the Tule Lake people a fanatical devotion to the principles of the militarist regime in Japan. By preying on fear of Selective Service they induced parents to exert pressure on their children to join the organizations. In addition they resorted to intimidation, threats of violence and actual violence in coercing residents to join the organizations and participate in their demonstrations. It was primarily due to the pressures of these organizations that over 80 per cent of the citizens eligible to do so applied for renunciation of citizenship this past winter. When Department of Justice representatives arrived at Tule Lake to conduct hearings on applications, the organizations stepped up their demonstrations and their pres-

tures on the applicants. Undoubtedly many of the applicants were in the grip of the emotional hysteria created by these organizations, or actually acting under fear of violence, in confirming their desire to renounce citizenship during the hearings. The general uniformity of the answers given indicated that the applicants were well coached. These facts are reflected in an increasing volume of cancellation requests from Tule Lake renunciants, who frankly state in many cases that they were acting under compulsion in renouncing their citizenship.

On January 19, 1945, Mr. John Burling, special representative of the Attorney General conducting renunciation hearings at Tule Lake, addressed a letter to the heads of the two principal organizations setting forth the position of the Department of Justice toward the activities of the organization. A copy of that letter is enclosed (Exhibit I). In that letter Mr. Burling, speaking for the Attorney General, strongly condemned the activities of the organizations and stated that they must stop. Despite this letter, which was widely circulated in the center, the activities of the organizations did not abate. In order to maintain peace and order, protect the Tule Lake residents who were loyal to this country or who disagreed with the aims and objectives of the organizations, and to stop the subversive activities of these groups, two steps were taken. One was the transfer of the known alien leaders of the organizations (including persons who had renounced their citizenship) to in-

ternment camps. The other was the adoption of the special project regulations prohibiting the overt demonstrations which were fundamental to the organizations' programs.

As a result of these two steps the organizations have lost much of their prestige. Many evacuees who joined the organizations have notified WRA of their withdrawal from membership. Opposition to the organizations has come out of hiding. Nevertheless the influence of the organizations is still strong, and their activities continue. The Director of the War Relocation Authority believes enforcement of the special project regulations is still necessary in order to maintain law and order at Tule Lake and guarantee to the law-abiding residents the right to live in peace and free from fear of violence and recrimination for failure to assert aggressive loyalty to Japanese war aims. In the light of the facts I am unable to disagree with his conclusion.

2. As you state, the special project regulations assign no definite penalty for the prohibited acts. These regulations were, however, issued under and subject to the provisions of WRA internal security regulations applicable to all centers (Exhibit II). These over-all regulations prescribe procedural safeguards with respect to arrests and prompt arraignment and hearing. The right of the accused to counsel is guaranteed and the Project Director is specifically responsible for seeing that a complete case is fairly presented. The maximum penalty that can be imposed by a Project Director for

commission of any one offense is imprisonment for not more than three months. In addition, any evacuee may of course carry his case directly to the Director of the Authority if he believes that he has been unjustly dealt with, and during the course of center operations a number of evacuees have done so.

Our investigation has revealed no departure from these over-all regulations by the Project Director in the enforcement of the special project regulations. While the sentence imposed in a number of cases has exceeded 90 days, this has been because more than one offense was committed. We have found no instance in which the sentence imposed exceeded 90 days on any one count. Out of 454 persons apprehended for open violation of the special project regulations, 424 have been released without further action, after lectures on their behavior. Eleven received sentences ranging from 90 to 270 days. The remainder received sentences of 90 to 360 days, with 60 to 250 days of the sentence suspended on condition that they not violate the regulations after release. It has been the general practice to carry out sentences of imprisonment only in cases where the violator is recalcitrant and states that he will continue to disregard the regulations if released. I believe that these facts reflect sane and considerate handling of this difficult problem.

3. Four recent cases of violation, including the two you mention in your letter of July 6, have involved persons under 18 years of age. Reports on these cases are enclosed (Exhibit III). Despite the

youth of the offenders, the facts in the cases do not indicate in my judgment that the sentences imposed were unnecessarily harsh or that the cases could have been handled satisfactorily in some other manner.

None of the four youths involved in these cases has been classified as a detainee by the Western Defense Command or by the Department of Justice. So long as they wish to remain residents of the center they will be required under WRA regulations to serve their sentences. They are, however, free at any time to leave the center even if they are serving a sentence for violation of center regulations. The War Relocation Authority does not maintain that it has power to detain any person who is eligible to leave the center and wishes to do so, even if he is being disciplined for violation of project regulations. Administrative Notice No. 207, which prescribes this policy, is enclosed (Exhibit IV). I should also point out that the Authority could legally expel any such person from a center, although as a matter of policy this power is exercised only in aggravated cases.

In summary, I am unable to conclude on the basis of our investigation that the special project regulations are unnecessary, that the WRA procedures for enforcement of the regulations are unreasonable, or that the Project Director at Tule Lake has exceeded his authority or been other than temperate under the circumstances in enforcing the regulations. I do not, of course, believe that my

judgment should interfere with any action that the American Civil Liberties Union might deem appropriate under the circumstances. I should like to point out, however, that action such as you propose will doubtless be widely publicized. Enemies of the evacuees on the West Coast will undoubtedly play up the activities of the pro-Japanese organizations which will be the basis for the Government's defense. So far as the long run interests of persons of Japanese ancestry in this country are concerned, I think that the contemplated action would be a serious mistake.

Sincerely yours,

/s/ ABE FORTAS,

Under Secretary.

United States of America,
State of California,
County of Modoc—ss.

Harry Uchida, being first duly sworn, deposes and says: that he is one of the petitioners in the foregoing Supplement and Amendment to Petition For Writ of Habeas Corpus named; that he is detained at the Tule Lake Center, Newell, Modoc County, California; that he makes this affidavit and verification thereof on his own behalf as such a petitioner, and on behalf of each and all the petitioners therein, each of whom likewise is confined and detained at said Tule Lake Center by respondent, and each of whom has authorized him so to do, and because it is impracticable to have the same

verified by each of them by reason of the said confinement and detention of each, their large number and the long period of time which would be required and be consumed to have such done; that he personally knows the facts set forth in said supplement which apply equally to each and all of said petitioners; that he has read the foregoing Supplement and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such that he believes it to be true.

/s/ HARRY UCHIDA.

Subscribed and sworn to before me this 24th day of February, 1946.

[Seal] /s/ JOE J. THOMAS,
Notary Public in and for the County of Modoc,
State of California.

My Commission Expires Sept. 20, 1949.

[Endorsed]: Filed Mar. 4, 1946.

It is stipulated that the foregoing pleading supplementing and amending the petition for writ of habeas corpus herein be filed herein as such pleading and that service thereof be deemed to have been made on respondent this 4th day of March, 1946.

IVAN WILLIAMS,

Respondent.

TOM C. CLARK,

Attorney General.

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ R. B. McMILLAN,

Assistant U. S. Attorney,

Attorneys for Respondent.

The foregoing Supplement and Amendment to Petition for Writ of Habeas Corpus is hereby ordered filed as such pleading in the above-entitled proceeding this 4th day of March, 1946.

/s/ A. F. ST. SURE,

U. S. District Judge.

[Title of District Court and Cause.]

STIPULATION AND ORDER RE PRODUCTION OF PETITIONERS

It Is Stipulated between the parties hereto that the petitioners in this proceeding who are not released from custody while in Northern California

or elsewhere by the respondent or by order of the Attorney General of the United States and who shall be transferred, in custody, for the convenience of the Government, to an internment camp or place of restraint other than the Tule Lake Center, Newell, Modoc County, California, whether the same be situated in Santa Fe, New Mexico, Crystal City, Texas, or elsewhere, will be produced before the above-entitled Court for hearing or trial purposes in the above-entitled proceeding, upon reasonable notice, by the United States Government, the Attorney General of the United States, or the respondent as their agent.

Dated: March 14, 1946.

/s/ WARNE M. COLLINS,
Attorney for Applicants
and Petitioners.

IVAN WILLIAMS,
Respondent.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Respondent.

So Ordered: March 14, 1946.

/s/ A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Mar. 14, 1946.

[Title of District Court and Cause.]

MOTION TO STRIKE

Respondent Ivan Williams moves to strike from the Petition for Habeas Corpus and the Amendment and Supplement thereto filed herein certain redundant, immaterial and impertinent matter identified below.

I.

Exhibit 1 to the Petition as originally filed and Exhibit 2 to the "Supplement and Amendment to Petition * * *" herein, comprise evidentiary matter, are impertinent, immaterial and redundant; and as a result of their inclusion in it, the allegations of the Petition are not simple, concise, and direct, and fail to state a cause of action with sufficient definiteness to permit Respondent properly to plead thereto. For these reasons, the two exhibits described, and all references to or discussions of them, should be stricken from the pleadings.

II.

Paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of the "Supplement and Amendment to Petition * * *" contain allegations evidentiary in character; they and each of them contain matter which is impertinent, immaterial and redundant; and as a result of their inclusion in it, the allegations of the Petition are not simple, concise, and direct, and do not state a cause of action with sufficient

definiteness to permit Respondent properly to plead thereto. For these reasons, all the said paragraphs should be stricken from the pleadings.

III.

Paragraphs III, IV, V, VI, and VII of the Petition as originally filed contain allegations evidentiary in nature; they, and each of them, contain matter which is impertinent, immaterial and redundant; and as a result of their inclusion in it the allegations of the Petition are not simple, concise, and direct, and do not state a cause of action with sufficient definiteness to permit Respondent properly to plead thereto. For these reasons, all of the said paragraphs should be stricken from the pleadings.

IV.

By reason of the fact that the objectionable matter referred to in paragraphs I through III herein is inextricably confused and intermingled with the allegations of essential fact in the Petition and Supplement and Amendment thereto, the Petition as originally filed and the Supplement and Amendment thereto are themselves rendered impertinent, immaterial and redundant, and fail to meet the required standards: that they be simple, concise, and direct. For these reasons, the Petition as originally filed and the Supplement and Amendment thereto

should be, and Respondent moves that they be, stricken.

Respectfully submitted,

/s/ FRANK J. HENNESSY,

U. S. Attorney,

Attorney for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed April 15, 1946.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 25,296-R

TADAYASU ABO, et al.,

Plaintiffs,

vs.

IVAN WILLIAMS, as Officer in Charge, et al.,
Defendants.

ORDER

Defendants' motion to strike

(1) Exhibit 2 attached to the Supplement and
Amendment to Complaint,

(2) Paragraphs (c), (d), (e), (f), (h), (i), and
(j) of the Supplement and Amendment to Com-
plaint and paragraphs III, IV, V, VI, VII and
VIII of the first cause of action in the original
complaint is Granted.

(3) Defendants' motion to dismiss the original complaint and the Supplement and Amendment thereto is Granted with 20 days within which to amend.

/s/ A. F. ST. SURE,
U. S. District Judge.

Dated: July 10, 1946.

[Endorsed]: Filed July 11, 1946.

In the Southern Division of the United States District Court for the Northern District of California

(No. 25296-S) Consolidated No. 25294

In the Matter of the Application for a Writ of Habeas Corpus by TADAYASU ABO, et al., etc.,

Applicants,

and

TADAYASU ABO, et al., etc.,

Petitioners,

vs.

IVAN WILLIAMS, as the Officer in Charge, etc.,
Respondent.

AMENDED PETITION FOR WRIT
OF HABEAS CORPUS

To the Honorable, the Southern Division of the United States District Court for the Northern District of California:

The amended petition of each of the petitioners above-named for a writ of habeas corpus respectfully shows:

I.

Each petitioner is authorized to bring and maintain this proceeding in habeas corpus and this court has original jurisdiction of this petition by virtue of the provisions of the Habeas Corpus Acts, Title 28 USCA, sec. 451 et seq., and the provisions of Title 8 USCA, sec. 903, the petitioners jointly and severally bringing and maintaining this class proceeding under the procedure authorized in habeas corpus proceedings and the practice conforming to the practice in actions at law or suits in equity and pursuant to the provisions of Rules, 20, 23(1), 23(2), 23(3), 18(a), 18(b), 19(a), 19(b), and 81(a) (2), of the Rules of Civil Procedure for the District Courts of the United States.

II.

Each petitioner is a person of Japanese ancestry and at all times herein mentioned has been and is domiciled in the United States and has been and is a resident of the northern district of California therein; each is a native-born American citizen and national of the United States and subject to the jurisdiction thereof; each is and ever since his or her birth in this country has been and now is loyal and devoted to this country; none of them at any time whatever has been and none is an alien enemy, an alien, or a native, citizen, denizen or subject of

Japan or of any hostile or foreign nation, government or country; none at any time has been and none is a danger to the public peace or safety and none at any time has been accorded any hearing by the Government upon any charge or accusation that he or she was or is such a danger and, on the contrary, on December 17, 1944, effective as of January 2, 1945, Major General H. Pratt, U.S.A., the military commander in command of the Western Defense Command and Fourth Army, promulgated Public Proclamation No. 21 which revoked the 108 mass "civilian exclusion orders" theretofore issued by Lt. General John L. DeWitt, his predecessor in said command, and revoked the restrictions theretofore placed upon each petitioner and all persons of Japanese ancestry affected thereby; and on September 4, 1945, said General Pratt, as such military commander, promulgated Public Proclamation No. 24 which rescinded "all Individual Exclusion Orders in Effect" as of that date and removed all military prohibitions against the entry and presence of petitioners and of all other persons affected thereby within the West Coast Exclusion Zone; and each of said public proclamations was an official executive finding, judgment and decision that none of the persons affected thereby, including each petitioner herein, was hostile or dangerous to the security of the United States of America.

III.

Each petitioner, contrary to his or her will and desire, and in violation of the due process of law guaranteed by the 5th Amendment, is unlawfully and unconstitutionally interned and restrained of his or her liberty for the purpose of deportation to Japan by the respondent Ivan Williams as the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, at the Tule Lake Center, situated within the jurisdiction of this Court, at Newell, Modoc County, California, said respondent acting under the order or orders of the Attorney General of the United States; and each now is interned by the respondent and has been and is scheduled for summary removal to Japan, as aforesaid, without prior notice of such removal having been given each of them by the Attorney General, and each is informed and believes and therefore alleges that the respondent, acting under the orders of said Attorney General and under a claim of color of authority of the Alien Enemy Act, Title 50 USCA, sec. 21, and presidential Proclamation No. 2625, asserts that each, by a purported renunciation of United States nationality in 1945, became an alien enemy and subject to such internment and removal.

IV.

Solely because of his or her Japanese lineage, and unlawfully and in violation of his or her rights, liberties, privileges and immunities guaranteed him

or her as a citizen of the United States and as a person subject to its jurisdiction by the 4th, 5th, 6th, 8th, 9th, 13th and 14th Amendments of the Constitution, each petitioner, by the Government, pursuant to proclamations, commands and orders of General John L. DeWitt, once Commander of the Western Defense Command and Fourth Army, during the year 1942, first was imprisoned in the immediate vicinity of his or her then home situated within the geographical area embraced by the Western Defense Command; then was excluded therefrom and was driven into and imprisoned in a stockade called an Assembly Center; then was transported to and was confined for approximately two years in a concentration camp called a War Relocation Center and thereafter was imprisoned in the Tule Lake Center, Newell, Modoc County, California, said imprisonment having been continuous from 1942 to date, in barbed wire enclosures patrolled by armed guards while the Government trained guns upon the internees, all without a charge of crime or accusation of crime having been lodged against any of them and without any hearing having been given them by the Government on the reasons for such treatment; and the Government thereby falsely branded them as disloyal and wrongfully attempted to repudiate them as citizens; and during the early part of 1945, at and while so interned in said Tule Lake Center, each of the petitioners, many of whom are infants and a few of whom then were and now are mental incompetents,

by reason of said mistreatment signed an application for renunciation of United States nationality, as provided for by Title 8 USCA, sec. 801(i), and Sections 316.1 to 316.9, inclusive, of the Nationality Regulations; none of said applications has been approved by the Attorney General of the United States, and he has not issued an order approving any of them, as is required by Title 8, USCA, sec. 801(i) and Rule 316.7 of the Nationality Regulations, before such becomes effective, and each of said purported renunciations is void and invalid for said reason.

V.

In the early part of 1945 a hearing was accorded each petitioner upon such application for renunciation before a hearing officer designated by the then Attorney General of the United States; said hearing was wanting in each and all of the elements of a fair and impartial hearing, and in the incidents thereof, guaranteed by the 6th Amendment, and deprived each petitioner of the due process of law guaranteed each by the 5th Amendment in that each petitioner, by said officer, then and there was deprived of the benefits of independent advice and of the assistance of counsel in and about said hearing, was denied the right to be confronted by any evidence and to examine witnesses against him or her or to produce witnesses in his or her behalf, albeit none of the petitioners waived his or her rights thereto, and in that the hearing officer's recommendation to approve each application was

made, as was based all subsequent action taken thereon, upon secret information and data which was considered and given controlling weight by the hearing officer but which was withheld, concealed and kept secret from each petitioner, as provided by the provisions of Section 316.6 of the said Nationality Regulations; and at the time and at all times herein mentioned said Center was patrolled by armed guards and the Government trained guns upon said Center and upon the internees there confined;

The signing of said applications and the hearing held thereon, as aforesaid, was designed by the Government of the United States to cause and result in the detention and deportation of each signer to Japan and of the removal of members of his or her family to Japan and, consequently, to result in their continued detention for an indefinite period of time which was to be followed by a mass banishment of persons of Japanese descent from the United States, which design and purpose at all times heretofore was withheld and kept secret from the petitioners.

VI.

The said provisions of Title 8 USCA, sec. 801(i), and Sections 316.1 to 316.9, inclusive, of the said Nationality Regulations, and each of said provisions, and each of the aforesaid applications for renunciation executed thereunder and the aforesaid purported renunciations of U. S. nationality by each petitioner, and the provisions of Title 50

USCA, secs. 21 and 22, are, and each of them is, unconstitutional, void and invalid on its face and also as applied to each petitioner for each of the following reasons, to-wit, (1) for invading the right of each to be secure in his person, house, papers, and effects against unreasonable searches and seizures guaranteed by the 4th Amendment; (2) for depriving each of his liberty and property without due process of law guaranteed by the 5th Amendment; (3) for holding each for an unspecified "infamous crime" without a presentment or indictment of a grand jury in violation of the 5th Amendment; (4) for depriving each of his right to a speedy, public, fair and impartial trial and its incidents guaranteed by the 6th Amendment; (5) for inflicting on each a cruel and unusual punishment in violation of the 8th Amendment; (6) for denying and disparaging rights vested in each and retained by the people, in violation of the 9th Amendment; (7) for subjecting each to slavery and involuntary servitude for punishment not for crime upon which convicted but because of type of lineage, in violation of the 13th Amendment; (8) for depriving each of United States citizenship and State citizenship conferred upon each by reason of his birth in the United States by the 14th Amendment, in violation of the 5th and 14th Amendments; (9) for denying and abridging the right of each as a citizen to vote on account of his or her race, color or previous condition of servitude, in violation of the 15th Amendment; (10) for being repugnant to the pro-

visions of Sec. 9 of Art. I of the Constitution prohibiting bills of attainder and ex post facto laws; (11) for being contrary to the common defense and general welfare clauses of Sec. 8 of Art. I of the Constitution; (12) for being uncertain and for containing an unconstitutional delegation of legislative power to the Attorney General, in violation of the provisions of Sec. 1, of Art. I of the Constitution; (13) for containing an unconstitutional delegation of judicial power to the Attorney General, in violation of the provisions of Sec. 1 of Art. III of the Constitution; (14) for being contrary to the provisions of Sec. 3 of Art. III of the Constitution defining treason as consisting of levying war against the United States, or in adhering to their enemies, giving them aid and comfort, and forbidding the same; (15) for being contrary to the provisions of Sec. 3 of Art. III of the Constitution prohibiting the working of corruption of the blood or forfeiture for the constructive treason of the remote ancestors of each; (16) for being contrary to the provisions of Subdivision 2 of Art. VI of the Constitution making the Constitution and the 14th Amendment conferring and safeguarding citizenship by birth on each the supreme law of the land; (17) and for depriving each petitioner of each and all of his aforesaid rights, liberties, privileges, immunities and his implied rights of national and State citizenship as a citizen of the United States and as a person subject to its jurisdiction, in violation of the due process clause of the 5th Amendment; and the

aforesaid imprisonment, internment, duress in which each petitioner has been and is held by the Government, and his or her scheduled removal to Japan by the Government, as aforesaid, are, and each of said things is unconstitutional, void and invalid for each and all of the aforesaid reasons.

VII.

The signing of the renunciation application by each petitioner was neither under oath nor real nor free nor voluntary but was caused by and was the result of the duress in which each then and there was held by the U. S. Government and the concurrent duress, menace, coercion, fraud, undue influence and intimidation under which each then and there was held and subjected to by the groups and individuals, as hereinafter set forth.

VIII.

Commencing with their unlawful imprisonment in the vicinity of their homes, as aforesaid, and continuously since then to date, the United States Government, acting by and through the War Relocation Authority, a federal agency, and its agents, servants and employees, and respondent, as the jailor, custodian and guardian of petitioners, its wards, in violation of the due process of law guaranteed each petitioner by the 5th Amendment and in violation of the provisions guaranteed each of them by the 4th, 5th, 6th, 8th, 9th, 13th and 14th Amendments, has unlawfully discriminated against the petitioners and each of them and has unlaw-

fully imprisoned them and members of their immediate families and fraudulently has made and rendered and renders said imprisonment unjustly and unnecessarily prolonged, harassing and oppressive in the following respects, among others, to-wit:

(a) Shortly following their evacuation, as aforesaid, it demanded of each evacuee a false admission of prior allegiance to Japan and, upon the refusal of any to make such an admission, it incarcerated such person in said Tule Lake Center where it destined such person for detention for an indefinite period of time and for final deportation to Japan; ever since the early part of 1942, it has falsely branded each petitioner as disloyal and hostile to the United States and has and does wrongfully attempt to repudiate them as citizens simply because of their Japanese ancestry, and said mistreatment engendered hostility to them throughout the nation and created in them a belief and great fear of being relocated in this country where their lives and well-being would be endangered by reason of the existence of said hostility to them; it has continuously deprived petitioners and each of them of all of their rights of national and state citizenship; it has failed and refused to accord them or any of them a hearing on the reasons for said imprisonment and treatment; it has regarded, classed and treated each and all of them as being disloyal and as being alien enemies, in 1942 classifying all of them who were eligible for military service as "4-C" under the Selective Training and Service

Act of 1940, including those among them who were honorably discharged veterans of this war and those who were and are in the enlisted reserve; in 1942 it denied all of them the right to perform military service for this nation as well as to do work of national importance, exacted their fingerprints from them, photographed them for identification purposes as though they were alien enemies and, by reason of said mistreatment, led them to believe and fear they would be deported to Japan and that if they did not first relinquish U. S. nationality they would, upon arrival in Japan, be mistreated as being persons hostile to Japan; and

(b) At said Tule Lake Center from on or about October 1, 1945, to on or about March 20, 1946, on at least twenty (20) occasions, the said War Relocation Authority interfered with the confidential privileged communication relationship existing between petitioners and their counsel herein and denied them their right to counsel by making and publishing recordings of long distance telephone conversations had between petitioners in said Center and their counsel in San Francisco; prior to the time of the aforesaid renunciation hearings the U. S. Government, through the War Relocation Authority, set up within the limits of said Center, and thereafter until November, 1945, continuously maintained a special jail termed "The Stockade" wherein it incarcerated innocent citizens detained in said Center, without accusation of crime or wrongdoing on their part and without hearings on

the cause therefor at any time having been afforded them and without allowing them the assistance of counsel and there held hundreds of them incommunicado for various periods of time ranging from a few hours to 360 days, all without cause; said practices were designed to instil and they did instil in the petitioners and prisoner-evacuees confined to said Center a great fear of the governmental power wielded over them and said practices were parts and phases of the duress in which the Government held the petitioners and all residents of said Center; and

(c) As part of the Government's systematic program of duress in which it held the petitioners and all residents in said Center the said War Relocation Authority, in violation of the 13th Amendment, established and maintained for the past four years a slavery and peonage system at said Center, in manner as follows, to-wit: it organized therein a club known as the "Recreation Club" for the private and personal benefit of the Caucasian employees of said War Relocation Authority to whom membership therein was restricted and through such an instrumentality deliberately exploited hundreds of persons of Japanese ancestry confined to its charge; each member thereof paid to said Club the sum of \$30.00 per month for which the said Club hired out to such member an internee to serve such member in private employment and paid such internee therefor either the sum of \$16.00 or \$19.00 per month, depending upon the character of the

service, for labor performed on a forty (40) hour week basis, the remainder of the \$30.00 being retained by said Club with exception of \$3.75 which the War Relocation Authority required the Club to pay such slave as a clothing allowance; and said practice was designed to instil and did instil in the petitioners and internees there confined a great fear of the governmental power exercised over them and was a part and phase of the aforesaid duress in which they were held; and

(d) Following the commencement of this proceeding, during January and February, 1946, the Attorney General of the United States summarily ordered each petitioner and renunciant to show cause why they should not be deported by him to Japan and each of them was subjected to such a purported hearing or examination conducted by hearing officers appointed by him; each requested of such hearing officer the right and opportunity to the assistance of counsel and the right to be represented by counsel thereat but each, by him, was denied said rights and was denied reasonable time and opportunity to prepare therefor and to obtain witnesses and evidence in his or her behalf; neither petitioners nor witnesses were sworn; the hearings were unduly brief; no adverse evidence was offered against any of them and none was adduced showing or tending to show that any of them was an alien enemy or hostile or dangerous to the security of this country; at said hearings, as also on the review by the Attorney General of the recommenda-

tions made by such hearing officers following the conclusion of such examinations, said officers and the Attorney General, in refusing to recommend the now detained petitioners for release from detention and to release them, considered and gave controlling weight to information contained in files and dossiers maintained by said officer, the nature and contents of which were kept secret from petitioners, and based such recommendations and refusals upon such secret information and upon mere whim and caprice; said hearings were arbitrary, unreasonable and oppressive in character and were wholly unfair for said reasons and deprived each of them of the due process of law guaranteed each of them by the 5th Amendment and constitute a part and phase of the duress in which each petitioner has been and is detained by the Government; and

(e) Ever since the conclusion of said hearings the Attorney General, over the protests of petitioners and their counsel, and in violation of the provisions of the 4th Amendment and the due process of law guaranteed by the 5th Amendment, has denied and denies petitioners their right to counsel and their right of confidential privileged communications by subjecting petitioners' mail to their counsel and their counsel's letters to them, to censorship, and by posting censors and eavesdroppers to attend and listen to the consultations and conferences petitioners have held with their counsel in connection with this proceeding, and said inter-

ference with and denial of said rights is a part and phase of the duress in which the Government has held and holds petitioners; and

(f) While holding the petitioners in duress, as aforesaid, the Government, through its agents, servants and employees and the War Relocation Authority, further rendered said imprisonment unjustly and unnecessarily harassing and oppressive by fostering, sponsoring and allowing terroristic groups to operate in said Center and to subject the petitioners to the duress, menace, fraud, undue influence, coercion and intimidation practiced upon them by said groups which concurrently caused the said renunciations, as hereinafter alleged;

(g) Since the commencement of this proceeding, the Government has made it a practice to permit aliens to leave said Center and return to their former homes in this country while it holds their children who have signed renunciation applications for involuntary removal to Japan and compels the relocated members of their families, including veterans of this war, to the choice of an involuntary exile from the United States to Japan to accompany them to preserve their family unity or to remain here separated from them;

(h) Neither the Government nor any of its agents, servants or employees has subjected any similarly situated U. S. citizens of other ancestry or extraction to the aforesaid duress or any duress.

IX.

By reason whereof the petitioners were led by the Government, to believe and fear and they did believe and fear and had good cause to believe and fear that the Government of the United States classed, treated and viewed them as alien enemies and that it had repudiated their citizenship and that it desired and intended to deprive and had deprived them of citizenship and of their right to defend this country and that it intended to imprison them for an indefinite period of time and finally to remove and banish them and their families and all like descended persons from the United States to Japan, and that the signing of renunciation applications was a matter commanded by the Government, compliance with which was prerequisite to their right and that of their families to remain united and in the protective security of said Center pending such banishment, and that relinquishment of U. S. nationality by them was necessary to save them from mistreatment in Japan following such banishment, and that it was necessary to save themselves and their families from physical harm and violence which was reigning in civilian communities hostile to persons of Japanese ancestry and which would have been unleashed against them were they or any of them to be restored to civilian life in this country while the war was raging; and

By reason of said governmental duress, concurrently with the duress, fraud, menace, coercion,

undue influence and intimidation practiced upon each petitioner and members of his or her family by organized terroristic groups, as hereinafter set forth, each petitioner was kept in a constant state of fear, fright, mass hysteria and terror and was deprived of freedom of will and choice in and about the signing of his or her said application for renunciation and was compelled by the Government against his or her will and desire and without his or her consent to sign a fictitious renunciation of citizenship, as aforesaid.

X.

In the latter part of 1944, at said Center, the War Relocation Authority, a federal executive agency to the charge of which all the evacuees in said Center, including each petitioner herein, were committed, adopted a policy of permitting and permitted organized groups of internees at said Center to operate Japanese language schools and to engage in and promote Japanese cultural activities therein and, pursuant to said policy, sponsored and fostered said educational and cultural movement; said groups so sponsored and fostered, then and thereafter, until all the renunciation applications herein mentioned had been executed, continuously operated therein with the full knowledge and consent of said agency and under the eyes and surveillance of its officers, agents and employees; said movement developed into an innocuous appearing "innocents front" organization which thereafter, by its organizers and leaders, all of whom were fanatical aliens

of Japanese nativity, was converted into a pro-Japanese nationalistic movement; at the time of said renunciation hearings it had developed into and was an active terroristic movement; said groups had as their object and purpose the compelling of each petitioner and internee in said Center to renounce U. S. nationality and to be removed to Japan; the real nature, purposes and bent of said movement was concealed from the petitioners and its inactive members who had joined it when it appeared to them to be a simple educational and cultural movement, as aforesaid, and when its true nature and purpose were not discernible; when the true nature and purposes thereof became apparent many members thereof did not dare to protest the course thereof or openly to resign therefrom because of the coercion of said groups and for fear their own personal security and the security of members of their families thereby would be endangered, and many persons confined to said Center, including a number of the petitioners herein, were compelled to join the same as nominal inactive members for like security reasons.

XI.

Said groups engaged in a generalized campaign of lawlessness and terror in said Center prior to and during the time of said renunciation hearings and thereafter and, during said period of time, maintained a veritable rule and reign of terror over petitioners, their families and internees resid-

ing in said Center and, to accomplish their afore-said object and purpose, among other things, they preached and practiced sedition; they engaged in engendering, developing and promoting loyalty to the cause of Japan, which cause they notoriously espoused, by initiating Japanese-type military drill, riots, mass exercises, bugling, wearing Japanese insignia, emperor worship ceremonials and other purely Japanese nationalistic activities designed to instil in the internees a devotion to the militaristic regime in Japan; they endeavored by word and action, to proselyte to the cause of the enemy the petitioners, their families and other loyal internees there residing; they threatened the petitioners and internees that if any of them talked to, communicated with or associated with any of the Caucasians in and about said Center those so doing would be assaulted by gangsters and hoodlums commanded by them; they maintained an elaborate system of black-listing and espionage over the petitioners and internees in said Center; they threatened petitioners that they and their families were classed, treated and regarded by the United States Government as alien enemies and that it had scheduled them and their families for deportation to Japan and that upon arrival in Japan they would be treated as being persons hostile to Japan unless they first had relinquished U. S. nationality; they threatened the petitioners, as did governmental announcements publicly made just prior to the time said hearings were held in

1945, that the deportation of each petitioner and that of alien members of his or her family, on an exchange ship, was imminent and impending and that each would be deported in any event, and that if he or she failed to sign an application for renunciation the security of each and that of members of his or her family, upon arrival in Japan, would be endangered because the leaders of said groups would report them to the Japanese Government as being dangerous alien enemies to Japan and as being American spies and that they there would be seized and punished as such; they threatened them that if any of them succeeded in being relocated in civil walks of life in this country their lives would be placed in jeopardy because of the community prejudice and hostility there reigning against them because of their type of ancestry and informed them that there had been innumerable acts of physical violence perpetrated against persons of like ancestry who had been relocated in civilian communities where hostility to persons of Japanese ancestry was rampant; they sent in spurious letters to the Department of Justice requesting renunciation applications be forwarded to internees whose names they signed to such requests and then informed the receivers of such forms that the government required their renunciations; they maintained and operated schools in said Center to coach and did coach the petitioner victims of their deceit and coercion into giving false answers to the questions the hearing officers were to propound to

them at the renunciation hearings; by threats and by preying on fear of the circumstances in which all internees were held they induced parents to exert pressure on their interned children to join the groups to participate in their demonstrations and to execute renunciation applications; they threatened, coerced and intimidated petitioners and all other renunciants into signing such renunciation applications by each and all of the aforesaid means and by means of threats, displays, exhibitions and overt demonstrations of force and violence and by assaults on internees and by threats against their lives and by threats of inflicting great physical injury upon them and members of their families in the event he or she failed to obey their mandates to sign such renunciation applications.

XII.

The United States Government, by and through the Secretary of the Interior as the head of the War Relocation Authority to whose charge petitioners and all internees in said Tule Lake Center were committed by the Chief Executive at the time of said renunciations, through the Hon. Abe Fortas, as the Under Secretary of the Interior, on or about August 6, 1945, proclaimed, made and published in the regular course of his official duties, concerning facts of which he had official cognizance, an official executive finding of fact, judgment, decision and report in writing, that it was primarily due to the duress, fraud, menace, coercion, undue influence and

intimidation practiced upon each petitioner and all renunciants in said Center by the aforesaid groups that caused the renunciation applications to be signed by each of the petitioners and all other renunciants therein; and to supply substantial allegations of fact essential to this cause of action each petitioner alleges that said official executive finding of fact, judgment, decision and report is as follows:

“When Tule Lake became a segregation center, WRA adopted a policy of permitting evacuees to operate Japanese language schools and engage in Japanese cultural activities, in recognition of the fact that many of the residents sincerely desired repatriation to Japan and that children should be given an opportunity to become acquainted with Japanese culture. Unfortunately this policy was utilized as an entering wedge by a number of strongly pro-Japanese evacuees for the formation of virulently pro-Japanese nationalistic organizations. These evacuees were motivated chiefly by the desire to attain standing in the eyes of the Japanese government and obtain positions of leadership in the colony. To this end they instituted Japanese-type military drill, mass exercises, bugling, wearing of Japanese insignia, emperor worship ceremonials, pro-Japanese demonstrations, and other purely Japanese nationalistic activities designed not to serve any cultural purposes but to instil in the Tule Lake people a fanatical devotion to the principles of the militaristic regime in Japan. By preying on fear of Selective Service they induced parents to exert pressure on their children to join

the organizations. In addition they resorted to intimidation, threats of violence and actual violence in coercing residents to join the organizations and participate in their demonstrations. It was primarily due to the pressure of these organizations that over 80 per cent of the citizens eligible to do so applied for renunciation of citizenship this past winter. When Department of Justice representatives arrived at Tule Lake to conduct hearings on applications, the organizations stepped up their demonstrations and their pressures on the applicants."

XIII.

By reason of said rule of terror reigning over them and the duress in which each was held each petitioner believed in and feared said threats of said terroristic groups would be carried into execution against him or her and members of their families and that he or she and his or her family would be exposed to physical violence and probable loss of life if he or she failed to heed said threats and to obey the mandates of said pressure groups and thereby was compelled to sign and did sign said renunciation application against his or her will and desire and without his or her consent.

XIV.

At all times during said rule of terror imposed upon the petitioners and internees in said Center the United States Government, and its agents, servants and employees in charge of said Center, were aware of and knew of the purposes and

activities of said pressure groups and of the duress, menace, fraud, coercion, undue influence and intimidation said groups practiced upon and against petitioners, members of their families and other internees there confined, but condoned the same and was responsible for, and actually aided and abetted the same and was accessory thereto by virtue of the facts of having sponsored and fostered the activities of the aforesaid groups, by failing to prevent and to stop the same, by failing to arrest and prosecute the leaders and active members thereof, by failing to isolate and segregate such criminal elements from the petitioners and other loyal internees, by failing to take precautionary measures to prevent such rule of terror, and by failing to protect petitioners against said lawlessness and from harm from said sources, and to safeguard their rights as American citizens.

After the aforesaid renunciation hearings had been concluded the U. S. Government seized all the organizers, leaders and active members of the aforesaid pressure groups and forcibly transported them to other internment camps from whence all of them thereafter, since the filing of this proceeding, were voluntarily repatriated to Japan by the Government; the duress, menace, fraud, coercion and undue influence to which said groups subjected petitioners did not abate until the last of said groups had been transported, as aforesaid, and did not cease until the last of said group had been repatriated to Japan.

XV.

A total of 5,371 native born American citizens of 18 years and upward, included in which number is each of the petitioners, executed applications for renunciation of United States nationality at said Center; each of them did so as the direct and proximate result of and by virtue of the duress in which they then and there and for a long period of time prior thereto had been held by the U. S. Government, as aforesaid, and by virtue of the concurrent duress, menace, fraud, undue influence and coercion of the aforesaid terroristic pressure groups operating therein, as aforesaid, and against which the United States Government, its agents, servants and employees, and particularly the said War Relocation Authority, gave the petitioners and said renunciants no protection, as hereinabove alleged.

XVI.

That none of said renunciations were real, free or voluntary on the part of any of the petitioners, but each was caused by and was the proximate result of fear, fright, torment and terror induced in each petitioner's mind by virtue of the duress, menace, fraud and undue influence to which each was subjected by the groups and individuals, and the duress in which each was held by the Government, as aforesaid, all of which operated to deprive and did deprive each petitioner of freedom of choice, will and desire in and about the signing of

such application for renunciation, and each of said renunciations was and is false, fictitious, null and void by reason thereof.

XVII.

Prior to the time of the filing of this petition each petitioner, twice in writing, notified the Attorney General of the United States, his agents and representatives, and the respondent as one of his agents, of the aforesaid duress which caused him or her to sign such renunciation application and that he or she rescinded, revoked and cancelled his or her said application for renunciation and purported renunciation of United States nationality for the reasons that the same was signed under duress, menace, fraud, coercion, undue influence and mistakes of fact and of law, as aforesaid, and informed him and them of the grounds and reasons on which said rescission and revocation was based and made but said Attorney General failed and still does fail to accept said rescission and revocation; in each of said notifications each petitioner demanded of him and of respondent, that he or she be discharged from said internment, detention and unlawful restraint upon his or her liberty, but the Attorney General of the United States, his agents and representatives, and the respondent, acting under his orders, failed and refused and do still fail and refuse to release each and all of said petitioners from said internment, duress, restraint and threatened deportation to Japan.

XVIII.

The written orders, records and documents pertaining to each of the petitioners in connection with the matters and things set forth in this petition are in the exclusive possession, custody and control of the respondent and the Department of Justice; neither the petitioners nor any of them know the nature or contents thereof and none of them has had and none now has access thereto and the same never have been made available to petitioners or any of them or to their counsel and the same are now withheld from each of them and their counsel by the respondent and said Department of Justice.

None of the petitioners is held by virtue of any complaint, indictment, presentment, warrant, or quarantine law, rule, regulations, arrest or order, except as hereinabove specifically set forth; no prior application for a writ of habeas corpus related to the internment, detention or restraint complained of herein has been made by petitioners or by any of them in this or any other court.

Wherefore, each petitioner prays that a Writ of Habeas Corpus be awarded and issue herein directed to the said Ivan Williams as the Officer in Charge, United States Department of Justice, Immigration and Naturalization Service, at the Tule Lake Center, Newell, Modoc County, California, commanding him to have the body of each petitioner before the above-entitled Court at a time to be specified therein, to do and receive what then and there shall be commanded by the Court concerning

each petitioner, together with the time and cause of the detention of each, and said Writ; that each petitioner be restored to his or her liberty; that the Court find and adjudge that his or her application for renunciation of United States nationality was and is null, void and of no effect, and that any approval thereof made by the Attorney General of the United States or order issued by him approving the same, if any ever was made, was and is null, void and of no effect; that the Court find and adjudge that each petitioner is not an alien enemy and that each is a national and citizen of the United States; that the Court find and adjudge that his or her internment, detention and duress in which held was and is void and illegal; that any and all orders for his or her involuntary removal or deportation to Japan or to any foreign country or elsewhere be vacated and cancelled; that each have his or her costs of suit; and each petitioner prays for such other and further relief as may be just.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

United States of America,
State of California,
City and County of San Francisco—ss.

Masaru Yamaichi, being first duly sworn, deposes and says: That he is one of the petitioners in the foregoing amended petition named; that he makes this affidavit and verification thereof on his own

behalf as such a petitioner and on behalf of each and all the petitioners therein, each of whom has authorized him so to do, and because it is impracticable to have the same verified by each of them by reason of their detention, their large number and the long period of time which would be consumed to have such done and because of the shortness of time due to the threatened and imminent involuntary removal of petitioners, as alleged therein; that he personally knows the facts set forth therein which apply equally to each and all of said petitioners; that he has read the foregoing amended petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information or belief and as to such that he believes it to be true.

/s/ MASARU YAMAICHI.

Subscribed and Sworn to before me this 15th day of August, 1946.

[Seal] /s/ JANE M. DAUGHERTY,
Notary Public in and for the County of San Francisco, State of California.

My commission expires Sept. 24, 1949.

Service and receipt of copy acknowledged.

[Endorsed]: Filed Aug. 15, 1946.

[Title of District Court and Cause.]

MOTION TO STRIKE

Respondent Ivan Williams moves to strike from the amended petition for writ of habeas corpus filed herein certain redundant, immaterial and impertinent matters identified below, pursuant to Rules 8(e) and 12(f) of the Federal Rules of Civil Procedure:

All of the matters and allegations set forth in Paragraph XII of said amended petition for writ of habeas corpus, beginning with line 4, page 17, to and including line 16, page 18; on the ground that said allegations and matters comprise evidentiary matter; are impertinent, immaterial and redundant; and, as a result of their inclusion in it, the allegations of said amended petition for writ of habeas corpus are not simple, concise, and direct, as required by said Federal Rules.

That said matter constituted Exhibit No. 2, appended to the "Supplement and Amendment to Petition for Writ of Habeas Corpus" filed herein and ordered stricken by this Court on July 10, 1946.

For these reasons, said Paragraph XII, and the whole thereof, of said amended petition for writ of habeas corpus should be, and respondent Ivan Williams moves that same be, stricken.

Respectfully submitted,

/s/ FRANK J. HENNESSY,

U. S. Attorney.

Attorney for Respondent
Ivan Williams.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FOREGOING MOTION TO STRIKE

Respondent Ivan Williams refers to and hereby adopts the points and authorities in support of motion to strike, and memorandum supplemental to points and authorities in support of motion to strike filed by respondent in support of his motion to strike from the petition for writ of habeas corpus and amendment and supplement thereto, which motion to strike was granted by the Court on July 10, 1946.

The order of the Court of July 10, 1946, granting the motion to strike, has become the law of the case and thus requires that the matter contained in said Paragraph XII of the amended petition for writ of habeas corpus be stricken.

Respectfully submitted,

/s/ FRANK J. HENNESSY,

U. S. Attorney.

Attorney for Respondent

Ivan Williams.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 19, 1946.

[Title of District Court and Cause.]

RETURN

Irving F. Wixon, appearing in response to the petition for a writ of habeas corpus filed in the

above-entitled cause, respectfully shows this honorable Court:

That he is District Director of the Northern District of California for the Immigration and Naturalization Service of the Department of Justice of the United States; that in that capacity he has jurisdiction and control over all activities of the Immigration and Naturalization Service within that District; and that the custody of which petitioners complain is maintained by Respondent in his capacity as District Director for the said Service.

That the true cause of Petitioners' detention is as follows:

1. Petitioners are individuals who were born in the United States of Japanese parents and who possessed both Japanese and United States citizenship.

2. Each of petitioners voluntarily requested permission to renounce and did renounce his United States nationality by a formal written renunciation in a form prescribed by and before an officer designated by the Attorney General pursuant to the provisions of Section 401(i) of the Nationality Act of 1940, as amended, (8 U.S.C. 801(i)). Each renunciation was then approved by the Attorney General as not contrary to the interest of national defense, as required by that statute.

3. Petitioners thereupon lost their American nationality and became aliens of Japanese nationality.

4. Petitioners were then duly interned by the Attorney General as alien enemies subject to the

provisions of the Alien Enemy Act of 1798 (50 U.S.C. 21-23).

5. Petitioners are presently being held in custody pending their removal from the United States pursuant to the Alien Enemy Act, cited above, to Presidential Proclamations 2525 and 2655, and to the regulations of the Attorney General (10 F. R. 12189) promulgated thereunder. There is attached hereto and made a part hereof a copy of the order issued in the case of Hiroshi Watanabe which is similar to that outstanding in the case of each of the other petitioners who has not been released since the commencement of this action.

6. That the detention of petitioners described above is lawful and proper.

Wherefore, Respondent respectfully submits that no writ of habeas corpus should issue with respect to any of petitioners herein.

/s/ IRVING F. WIXON,

District Director Immigration and Naturalization
Service.

Respondent.

September 23, 1946.

Receipt of copy acknowledged.

In the Matter of
HIROSHI WATANABE
Alien Enemy

D.J. File No.
146-54-1879
B-1-13-23

ORDER

Whereas, Hiroshi Watanabe has appeared before a duly appointed hearing officer and has made a formal written renunciation of his United States citizenship pursuant to Section 401(i) of the Nationality Act of 1940, as amended, and whereas the said renunciation of nationality has been approved by the Attorney General as not contrary to the interests of national defense; and

Whereas, the above-named renunciant is deemed to be a native, citizen, subject or denizen of Japan and has as such heretofore been interned by order of the Attorney General pursuant to the Alien Enemy Act of 1798; and

Whereas, the said alien enemy has been afforded an opportunity for a full hearing before a repatriation hearing officer on the issue of his removal from the United States pursuant to the provisions of the Alien Enemy Act of 1798 and of Presidential Proclamation 2655 (10 Fed. Reg. 8947); and

Whereas, upon consideration of all the evidence relating to this matter the above-named renunciant is deemed by the Attorney General to be an alien enemy dangerous to the public peace and safety of the United States because he has adhered to the

government of Japan or to the principles of government thereof;

Now, Therefore,

It Is Ordered that the said alien enemy depart from the United States within thirty days after service of this order upon him; and

It Is Further Ordered that, in the event the said alien enemy fails or neglects to depart from the United States within the said thirty days, the Commissioner of Immigration and Naturalization shall provide for the alien's removal to Japan.

Dated, Washington, D. C. April 1, 1946.

/s/ TOM C. CLARK,
Attorney General.

[Endorsed]: Filed Sept. 23, 1946.

[Title of District Court and Cause.]

AMENDED RETURN

Irving F. Wixon, appearing in response to the Amended Petition for a Writ of Habeas Corpus filed in the above-entitled cause, shows this Honorable Court:

I.

Respondents make no answer to the conclusions of law set forth in Paragraph I of the Amended Petition.

II.

Respondents admit that each petitioner is a person of Japanese ancestry, a native, domiciliary of

the United States, and a resident of the Northern District of California. Respondents further admit that the proclamations mentioned in Paragraph II of the Amended Petition herein were issued and were withdrawn, as stated therein. Respondents assert that each Petitioner is an alien and a citizen and subject of Japan, and that the Attorney General has made a finding of dangerousness as to each Petitioner, acting within his powers pursuant to the Alien Enemy Act of 1798 and to Presidential Proclamations 2525 and 2655 and to the Regulations issued by him thereunder (10 F. R. 12189). Respondents deny that each or any of the Petitioners is presently a citizen or national of the United States or is loyal to the United States, that the withdrawal of the Proclamations set forth in Paragraph II of the Amended Petition had the effect of a finding that Petitioners herein were not hostile or dangerous to the security of the United States of America; and deny all other allegations of Paragraph II not otherwise answered herein.

III.

Respondents admit that each of Petitioners is interned in the custody of Respondent Irving F. Wixon, acting in his capacity as District Director of the Immigration and Naturalization Service for the Northern District of California, who is, in turn, acting under the direction of Respondent Tom C. Clark, Attorney General of the United States; and that each is held under order of removal from the United States issued by said Respondent Tom C.

Clark, acting lawfully pursuant to the Alien Enemy Act of 1798 and the Presidential Proclamations and the Regulations of the Attorney General cited above; but deny all other allegations and conclusions of Paragraph III of the Amended Petition herein.

IV.

Respondents admit that all of Petitioners were excluded from the Western Defense Command area in 1942, and, at the time of their renunciation of citizenship, were detained in the War Relocation Center known as Tule Lake, at Newell, California, which was surrounded by wire and guarded; but deny the remaining allegations of Paragraph IV of the Amended Petition filed herein; and assert that the renunciation of each of Petitioners was in fact approved by the Attorney General, as required by statute and regulations; and that each of said renunciations is valid and legally effective.

V.

Respondents admit that hearings were given to each Petitioner pursuant to the requirement of the statute and regulations; but assert that said hearings were conducted fairly and in conformity with Constitutional requirements, and assert that the purpose of the hearings given was, first, to ensure that each applicant for renunciation fully understood the nature and consequences of his act and undertook them voluntarily, and, second, to ascertain, pursuant to statutory requirement, whether approval of the attempted renunciation in each case

would be not contrary to national defense; and assert that such approval was not based on any information, secret or other, except what was voluntarily disclosed to the hearing officer by the applicant in the applicant's effort to obtain approval of his renunciation. Respondents deny all other allegations of Paragraph V of the Amended Petition filed herein.

VI.

Respondents admit the allegations of Paragraph VI of the Amended Petition filed herein, except insofar as they may be taken to draw the legal conclusion that Petitioners are or were subjected to duress in relation to their renunciation, or in any other connection. The existence of such duress is denied.

VII.

Respondents deny all allegations and conclusions in Paragraph VII of the Amended Petition filed herein.

VIII.

Respondents admit subsection (h) of Paragraph VIII of the Amended Petition filed herein; and assert that neither the Government nor any of its agents, servants or employees has subjected Petitioners herein to the duress alleged, or to any duress. Respondents deny all other allegations of said Paragraph VIII, with the exception of the following: Respondents admit that Petitioners have been detained at Tule Lake, and that each of them, since his renunciation and subsequent hearing and order

by the Attorney General, has been destined for removal to Japan. Respondents admit that in various sections of the country there existed hostility to Petitioners and other persons in the Tule Lake Center during their detention, and that, in consequence, many residents of the said Center were apprehensive of being relocated during the time prior to the unconditional surrender of the Japanese Government. Respondents admit that, for some time following the declaration of war, Petitioners and other persons in relocation centers were not accepted or drafted for service in the United States armed forces; and admit that Petitioners were fingerprinted and photographed for identification. Respondents assert that at a later period numerous individuals in the said relocation centers were, in fact, accepted for service in the armed forces and were called upon to perform other important services in the national war effort. Respondents admit that, since the entry of orders of removal by the Attorney General, surveillance was maintained over communications between Petitioners and persons not confined in the Center; and admit that there was maintained within the Center a disciplinary enclosure in which persons disturbing the orderly conduct of the said Center were from time to time detained. Respondents admit that there was in said Relocation Center a club of Caucasian employees of the said Center through which the said Caucasian employees employed, on a voluntary basis, individuals detained at the Center at the rates prescribed

for remuneration of such occupants of the said Center for all labor performed therein. Respondents admit that each of Petitioners, following his renunciation, was afforded an opportunity to show cause why he should not be removed to Japan; and assert that, at the hearings provided for the purpose of permitting cause to be shown, each Petitioner was given full opportunity to present such evidence as he wished.

IX.

Respondents deny all the allegations in Paragraph IX of the Amended Petition filed herein.

X.

Respondents admit that, as alleged in Paragraph X of the Amended Petition, the War Relocation Authority permitted the organization of groups of persons within the said Center for the purpose of operating Japanese language schools and promoting Japanese cultural activities therein; and admit that some of the said organizations and the leaders thereof were adherents of the nationalistic Japanese philosophy. All other allegations of said Paragraph X of the Amended Petition are denied.

XI.

Respondents admit that the organizations referred to in Paragraph X, above, engaged in engendering, developing and promoting loyalty to the cause of Japan, initiated Japanese-type military drill, mass exercises, bugling, wearing Japanese insignia, emperor worship ceremonials and other Japanese na-

tionalistic activities designed to instill in the residents of the Center a devotion to the militaristic regime in Japan. Respondents admit that these organizations engaged in misrepresentations with respect to the purpose and effect of the deportation and renunciation laws and the *and the* programs initiated by the Government thereunder, and engaged in a propaganda campaign the purpose of which was to persuade persons within the Relocation Center to renounce their American citizenship and assert their loyalty to the Japanese Government. Respondents admit that certain alien parents within the Relocation Center, both as a result of the activities of these organizations and for other reasons, attempted to persuade and in some instances did persuade their citizen children to renounce their citizenship. All other allegations of Paragraph XI of the Amended Petition are denied.

XII.

This Court's decision, that the letter set forth in Paragraph XII of the Amended Petition herein should be stricken as being improperly pleaded, renders unnecessary any response to said Paragraph XII.

XIII.

Respondents deny all the allegations contained in Paragraph XIII of the Amended Petition filed herein.

XIV.

Respondents deny all the allegations of Paragraph XIV of the Amended Petition filed herein,

and specifically deny the existence of duress, menace, fraud, coercion and undue influence on the part of the Government or otherwise at any time.

XV.

Respondents admit that 5,731 United States born individuals executed applications for renunciation of citizenship, among them Petitioners, but deny the other allegations of Paragraph XV of the Amended Petition.

XVI.

Respondents deny all the allegations contained in Paragraph XVI of the Amended Petition filed herein.

XVII.

Respondents admit that Petitioners made the allegations set forth in Paragraph XVII of the Amended Petition, and attempted to revoke their renunciations as there stated; but assert that the failure and refusal to accept the attempted revocation there alleged was necessitated by law, there being no power in the Attorney General to confer citizenship on persons who have lost it. Respondents admit, also, refusal to release Petitioners and assert that they will be removed to Japan pursuant to the orders of the Attorney General legally issued in their cases, as set forth above.

XVIII.

Respondents admit the allegations of Paragraph XVIII of the Amended Petition, with the exception that Petitioners or their counsel have access to the

orders issued in the respective cases upon request, and that certain other documents may, within the discretion of authorized officials, be made available upon proper request.

XIX.

And affirmatively answering the allegations of the Amended Petition herein, Respondents assert:

First, that renunciations were approved by the Attorney General only after the following procedural steps:

1. A written application for permission to renounce, signed by the prospective renunciant, was required to be filed in each case.

2. The submission of a formal statement of renunciation, upon which a hearing was held by an officer specially designated by the Attorney General prior to its approval.

3. Approval by the Attorney General based upon the report and recommendation of such hearing officer.

Second, at these hearings each renunciant appeared in person before the designated hearing officer in a private interview at which no other persons of Japanese ancestry were permitted to be present, except in cases where an interpreter was required.

Third, that it was the purpose of these hearings to make certain that the prospective renunciant fully understood the consequences of his act and undertook them voluntarily. To this end the officers were instructed to and did explain in full that

citizenship once lost could not be regained, and interrogated each prospective renunciant as to his reasons for wishing to renounce, explaining, in cases where such explanation seemed appropriate, that renunciation was not necessary in order to preserve family unity or in order to obtain an opportunity to depart for Japan.

Fourth, that a very large number of the Petitioners herein were, at the time of renunciation, themselves members of the nationalistic Japanese organizations described in the above Amended Petition and Amended Return thereto. That a very large number of Petitioners herein affirmatively asserted their belief in the principles and purposes of the said nationalistic organizations before the renunciation hearing officer at the hearing held under the conditions described above. That a very large number of Petitioners when appearing at such hearing openly avowed hostility to the United States and asserted their hope and desire for a Japanese victory. That a considerable number of Petitioners appeared before the hearing officers wearing garments comprising the uniform of the said nationalistic organizations, and performed parts of the ritual before the hearing officer.

Fifth, that, as indicated in the description of the procedures above, each of the Petitioners has individually filed a petition to be permitted to renounce, and that a not inconsiderable number of them wrote twice or more to the Attorney General complaining that their wishes in this respect were not granted more expeditiously.

Sixth, that a large proportion of Petitioners expressed the desire to leave the United States and reside permanently in Japan as a reason for their intention to renounce United States nationality.

Seventh, that a very large proportion of Petitioners herein made no attempt to retract their said renunciations until after the Atom Bomb had fallen on Japan and they had been apprised of the consequent surrender.

Eighth, accordingly, Respondents assert that, contrary to the allegations of Petitioners, Petitioners were not in fact coerced or led by any form of duress to renounce their citizenship as aforesaid, but in truth and in fact were voluntary and active participants in the movement for renunciation, and themselves renounced voluntarily and with full knowledge of the nature and consequences of their act.

Wherefore, Respondent respectfully submits that no Writ of Habeas Corpus should issue herein.

/s/ IRVING F. WIXON,

District Director Immigration and Naturalization
Service,

Respondent.

October 4th, 1946.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 4, 1946.

[Title of District Court and Cause.]

MOTION TO STRIKE

Each petitioner moves the court to strike the following matter from the amended return to the order to show cause herein, as follows:

1. From paragraph II thereof, the assertion on page 2, line 31, commencing with the words "Respondents assert" down to and including the words and figures "thereunder (10 F.R. 12189)" on line 4 of page 2, on the grounds the said matter is in irreconcilable conflict and inconsistent with the admission of the nativity, residence, domicile and presence in the United States of each petitioner, is an erroneous opinion and conclusion of law, is irrelevant and is sham, frivolous and evasive.

2. From paragraph II thereof, the concluding sentence thereof commencing with the words "Respondents deny" on line 4 of page 2, on the grounds said matter constitutes mere opinions and conclusions of law, is negative pregnant, and is sham, frivolous and evasive.

3. From paragraph III thereof, the phrase commencing with the words "acting lawfully" on line 19 of page 2 down to and including the words "cited above" on line 21 of said page, on the ground the same is mere opinion and conclusion of law.

4. From paragraph IV thereof, the matter commencing with the words "as required by statute" on line 2 of page 3 down to and including the word

“effective” on line 4 of said page, on the ground it contains mere opinions and conclusions of law.

5. From paragraph VIII thereof, the matter commencing with the words “and assert that neither” on line 3 of page 4 down to and including the words “or to any duress” on line 5 of said page, on the ground the same is in conflict and inconsistent with matters of fact of which the court has and takes judicial cognizance.

6. The whole of paragraph XII thereof, for being an erroneous opinion and conclusion of law and as being evasive.

7. From paragraph XVII thereof, the matter commencing with the words “but assert that the failure” on line 31 of page 6 down to and including the words “on persons who have lost it” on line 2 of page 7, on the ground the same is a mere opinion and conclusion of law, and is immaterial, irrelevant and evasive.

8. The whole of paragraph XIX thereof, except subsection “Second” on the grounds it does not constitute either a special or an affirmative defense, contains mere opinions and conclusions of law, relates to evidentiary matter, is redundant, immaterial, irrelevant, sham and evasive.

9. The whole of the following paragraphs thereof, to-wit, paragraphs I, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, and the whole of said amended return on the grounds the denials and admissions therein do not explicitly traverse the material allega-

tions of the amended petition; that the denials therein involve conclusions of law; that the denials therein are of matters of fact of which the respondents are presumed to have and have actual knowledge and, consequently, cannot be heard to deny; that the matters and things alleged in the amended petition are matters of fact of which the court has judicial knowledge or takes judicial cognizance and, in consequence, are matters of fact that cannot be denied by respondents; that the admissions in said amended return are inconsistent with the denials therein; that the denials therein are inconsistent with the admissions therein; that the denials therein are inconsistent with facts of which the court takes judicial cognizance; that the denials are vague, indefinite, uncertain and evasive; that the admissions therein are indefinite, uncertain and evasive; that the denials and admissions and assertions therein and the whole of said amended return are sham, frivolous and evasive.

This motion is made upon the amended petition for the writ, the order to show cause, the amended return to the order to show cause, this motion and notice of this motion.

Wherefore, each petitioner demands this motion to strike be granted; that leave to amend the amended return to the order to show cause be denied; that the writ be awarded and issue as

demanded by petitioners in their amended petition for the writ herein.

Dated: October 10, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Applicants and
Petitioners.

POINTS AND AUTHORITIES IN
SUPPORT OF MOTION

1. Rule 12(f) R.C.P. authorizes the striking of redundant, immaterial and impertinent matter from a pleading.

2. Immaterial matter may be stricken.

17 Hughes Fed. Prac. pg. 469, Sec. 20411, and cases there cited.

3. Redundant matter may be stricken.

17 Hughes Fed. Prac. pg. 469, Sec. 20411, and cases there cited.

4. Impertinent matter may be stricken.

17 Hughes Fed. Prac. pg. 470, Sec. 20412, and cases there cited.

5. Evidentiary matter may be stricken.

17 Hughes Fed. Prac. pg. 471, Sec. 20413, and cases there cited.

Respectfully submitted,

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 10, 1946.

[Title of District Court and Cause.]

TRAVERSE TO AMEND RETURN TO
ORDER TO SHOW CAUSE

Each petitioner in this proceeding, traversing matter contained in the amended return to the order to show cause, denies and alleges as follows:

I.

Traversing assertions contained in paragraph II of said amended return denies that each petitioner and/or any petitioner is an alien and/or a citizen and/or subject of Japan; denies that the Attorney General has made a finding of dangerousness as to each and/or any petitioner, acting within his powers as therein asserted or otherwise.

II.

Traversing matter contained in paragraph III thereof denies that each and/or any of the petitioners is held under order of removal from the United States by Tom C. Clark, Attorney General, and alleges that each petitioner now detained is held under a claim that such detention is pursuant to a purported order of removal from the United States issued by him and *alleges* that such order is void and invalid; denies that each and/or any of the said purported orders or removal issued by said Tom C. Clark was issued by him acting lawfully pursuant to the Alien Enemy Act and the Presidential Proclamations and the Regulations of the

Attorney General therein mentioned and alleges that each and all of the said purported orders of removal were issued after hostilities in the recent war had ceased and the war had terminated and long after the commencement of this proceeding and during the pendency of this proceeding.

III.

Traversing matter contained in paragraph IV thereof denies the assertion that the purported renunciation of each and/or any petitioner was in fact approved by the Attorney General, as required by statute and/or regulations; and denies that each of said purported renunciations and/or any of them is valid and/or legally effective.

IV.

Traversing matter contained in paragraph V thereof denies that hearings were given to each and/or any petitioner pursuant to the requirements of the statute and regulations therein referred to and alleges that said hearings, in truth and in fact, were perfunctory, arbitrary and oppressive pseudo-hearings lacking in all the elements of a fair and impartial hearing and of due process of law; and traversing the assertions contained in said paragraph denies each and every, all and singular, generally and specifically, the assertions therein contained.

V.

Traversing matter contained in paragraph VIII thereof denies each and every, all and singular,

generally and specifically, the assertions therein contained; traversing admissions therein contained denies he has been destined for removal to Japan by any valid order or orders of the Attorney General and alleges that after the commencement of this proceeding and during the pendency thereof the Attorney General unlawfully and unconstitutionally destined each for removal to Japan; denies that the therein mentioned admission or surveillance maintained over communications between petitioners and persons confined in the Center was maintained only since the purported entry of purported orders of removal by the Attorney General and alleges that such surveillance was maintained at all times during the imprisonment therein of each and all petitioner and alleges that such surveillance, consisting and still consisting of unlawful censorship, interference with the privileged communications between petitioners and their counsel and the deprivation of their right to counsel, was maintained by the Government over communications between petitioners and their counsel at all times herein from on or about July 1, 1945, to date, and still is maintained by the Government; denies the admission therein contained that each petitioner, following his purported renunciation, was afforded an opportunity to show cause why he should not be deported to Japan, and alleges that each arbitrarily was subjected to a pseudo-hearing on such matter wherein none of them was afforded a fair opportunity to show such cause.

VI.

Traversing matter contained in paragraph XIX thereof denies each and every, all and singular, generally and specifically, the assertions contained therein with the exception of the assertions contained in subsection "Second" of said paragraph XIX which are expressly admitted save that each alleges the hearing therein referred to, in truth and in fact, was not a fair hearing but was a pseudo-hearing and a Star Chamber proceeding as therein admitted; and alleges that a few of the petitioners, by virtue of the duress, menace, fraud, undue influence, coercion, mistakes of fact and of law, and the disabilities under which they labored in their imprisonment, as alleged in the amended petition herein, were incapacitated and prevented from revoking their renunciation applications and purported renunciations prior to the time the war terminated.

Wherefore, each petitioner prays that the writ of habeas corpus be awarded and issue herein commanding the respondents to produce the bodies of petitioners in court there to be discharged from the illegal custody of respondents without hearing being required.

Dated: October 10, 1946.

/s/ WAYNE M. COLLINS,

Attorney for Applicants and
Petitioners.

City and County of San Francisco,
State of California—ss.

W. M. Collins, being duly sworn on behalf of the petitioners in the foregoing traverse to amended return to order to show cause, says: that he has read the said traverse and knows the contents thereof and that the same is true except as to the matters therein stated on information or belief and as to those matters that he believes it to be true; that petitioners are absent from the City and County of San Francisco where affiant, their attorney, has his office and are detained outside said City and County by respondents, and therefore, affiant makes this affidavit.

/s/ W. M. COLLINS.

Subscribed and sworn to before me this 10th day of October, 1946.

[Seal] /s/ JANE M. DOUGHERTY,

Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 10, 1946.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT THAT
WRIT OF HABEAS CORPUS BE
AWARDED AND ISSUE COMMANDING
PRODUCTION OF PETITIONERS IN
COURT THERE TO BE DISCHARGED
FROM CUSTODY WITHOUT HEARING
BEING REQUIRED

Each petitioner moves the court for summary judgment that the writ of habeas corpus be awarded him or her and issue herein commanding the respondents to produce him or her in court there to be discharged from the custody of respondents, as prayed in the amended petition for the writ herein, without a hearing on the facts being required.

This motion is made upon the grounds that: (1) the defendants' Answer does not present any material issue of fact for determination; (2) the material issues of fact alleged in the amended complaint are either undenied or admitted in said Answer or are facts the existence and truth of which the Court has or takes judicial cognizance, in consequence of which the defendants are barred from denying the truth of the allegations of fact contained in said amended complaint and (3) the questions of fact must be resolved in favor of petitioners, as a matter of law, entitling each of them to the writ and to a discharge.

This motion is made and based upon the amended petition for the writ and order to show cause is-

sued thereon, the amended return to said order to show cause and amended petition, the traverse thereto, this motion and notice thereof, supporting affidavits to be filed herein, facts of which the Court takes judicial cognizance and stipulations of fact into which the parties will enter on the submission of said motion to this Court for adjudication.

Dated: October 14, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

1. A summary judgment is authorized in habeas corpus proceedings under the rule set forth in *Walker v. Johnston*, 312 U. S. 275, 284, and also by Rule 56(a) R.C.P.

2. There is no genuine issue raised by the Amended Return as to any material fact alleged in the amended petition for the writ and, in consequence, petitioners are entitled to summary judgment in their favor as a matter of law.

Inasmuch as the Amended Return does not controvert any material issue of fact and the evidence, as supplied by stipulations of fact, admissions and facts of which the Court takes judicial cognizance, reveals that the respondents have not and cannot deny the material facts alleged in the amended petition for the writ a summary judgment in favor of the petitioners is authorized by Rule

56(a) and 56(c) R.C.P. and the rule established in Walker v. Johnston, *supra*, and should be granted petitioners.

Respectfully submitted,
/s/ WAYNE M. COLLINS,
Attorneys for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 14, 1946.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEAD-
INGS THAT WRIT OF HABEAS CORPUS
BE AWARDED AND ISSUE COMMAND-
ING PRODUCTION OF PETITIONERS IN
COURT THERE TO BE DISCHARGED
FROM CUSTODY WITHOUT HEARING
BEING REQUIRED

Each petitioner moves the court for judgment on the pleadings herein that the writ of habeas corpus be awarded him or her and issue herein commanding the respondents to produce him or her in court there to be discharged from the custody of respondents as prayed in the amended petition for the writ herein, without a hearing on the facts being required.

This motion is made upon the grounds that: (1) the respondents' Amended Return to the Order to Show Cause and Petition for the Writ does not

present any material issue of fact for determination; (2) the material issues of fact alleged in the amended petition for the writ are either undenied or admitted in said amended return or are facts the existence and truth of which the Court has or takes judicial cognizance, in consequences of which the respondents are barred from denying the truth of the allegations of fact contained in said amended petition and (3) questions only of law are involved and these must be resolved in favor of petitioners, as a matter of law, entitling each of them to the writ and to a discharge.

This motion is made and based upon the amended petition for the writ and order to show cause issued thereon, the amended return to said order to show cause and amended petition, the traverse thereto, this motion and notice thereof, facts of which the Court takes judicial cognizance and stipulations of fact into which the parties will enter on the submission of said motion to this Court for adjudication.

Dated: October 14, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

1. A motion for judgment on the pleadings is authorized by Rule 12(c) R.C.P.

2. A motion for judgment on the pleadings lies where the issues presented by the pleadings are solely questions of law.

17 Hughes Federal Prac. pg. 444, Secs. 20351-20355, and cases there cited.

3. Judgment on the pleadings should be granted where the denials are evasive or bad or do not explicitly traverse the material allegations of a pleading or involve mere conclusions of law or are inconsistent with admissions or are vague, indefinite or uncertain.

See rules, 1 Bancroft Plead. & Prac. pages 924, 928, 929, 930 and 936, and cases there cited.

4. The Court is authorized to award the writ and have it issued commanding the production of the bodies of petitioners in court there to be discharged without a hearing being had on the merits inasmuch as the pleadings considered in conjunction with facts of which the Court takes judicial cognizance and stipulations of fact entered into between the parties leave only matters of law to be determined by the court. This rule was established in *Walker v. Johnston*, 312 U. S. 275, 284, in the following language:

“Since the allegations of the petition are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the

opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grants of the writ with consequent production of the prisoner and of witnesses may be avoided where such undisputed facts and from uncontrovertible facts such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts."

5. A mere renunciation of nationality, if constitutional or valid, does not convert a resident citizen into an alien enemy. At most it deprives him of political privileges. It leaves his residence undisturbed and leaves him a native of this country. As such he is not subject to detention or removal under the provisions of the Alien Enemy Act, Title 50 USCA, sec. 21.

6. The Alien Enemy Act expired when hostilities ceased on August 10, 1945.

7. The facts of the birth, domicile, residence and presence in the United States of each petitioner are alleged in paragraph II of the amended petition for the writ and those facts are expressly admitted in paragraph II of the respondents' amended return thereto. As a matter of law, therefore, each petitioner is entitled to a judgment on the pleadings awarding the writ and commanding his production in court there to be discharged from the illegal

custody of the respondents without a formal hearing on the facts being required, there being only questions of law to be decided and these must, by virtue of said facts, be resolved in favor of petitioners.

Respectfully submitted,
/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 14, 1946.

[Title of District Court and Cause.]

NOTICE OF HEARING OF MOTIONS

To Respondents and to Hon. Tom C. Clark, Attorney General, and Hon. Frank J. Hennessy, U. S. Attorney, Attorneys for Respondents:

You and each of you will please take notice that on Monday, October 28, 1946, at the hour of 10 o'clock A.M. of said day or so soon thereafter as counsel can be heard, petitioners will move the Court to grant their motions to strike, for judgment on the pleadings and for summary judgment which heretofore were filed herein.

Dated: October 16, 1946.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 16, 1946.

[Title of District Court and Cause.]

RESPONDENT'S POINTS AND AUTHORITIES
IN OPPOSITION TO COMPLAINANTS
MOTION FOR SUMMARY JUDGMENT
AND CROSS MOTION FOR SUMMARY JUDGMENT

B.

Respondent moves for a Summary Judgment in his favor.

I.

The affidavits hereto attached and the authorities heretofore cited establish that Complainants' renunciations are not vitiated by duress or otherwise.

It Is Therefore respectfully submitted that Complainants' Motion for Summary Judgment must be denied and Respondent's Motion for Summary Judgment be granted.

/s/ FRANK J. HENNESSY,

U. S. Attorney.

Attorney for Respondent
In Habeas Corpus.

[Endorsed]: Filed Nov. 12, 1946.

[See Transcript of Record in No. 12251 for affidavits of following: John L. Burling, page 147; Charles M. Rothstein, page 210; Ollie Collins, page 213; Joseph J. Shevlin, page 216, and Lillian C. Scott, page 219, in support of Motion.]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25296-S (Consolidated No. 25294-S)

In the Matter of the Application For A Writ of
Habeas Corpus by TADAYASU ABO, et al.,
etc.,

Petitioners, etc.

No. 25297-S (Consolidated No. 25294-S)

In the Matter of the Application For A Writ of
Habeas Corpus by MARY KANAME FU-
RUYA, et al., etc.,

Petitioners, etc.

PETITIONERS' AFFIDAVITS IN SUPPORT
OF THEIR MOTIONS FOR SUMMARY
JUDGMENT AND FOR JUDGMENT ON
THE PLEADINGS AND TO STRIKE RE-
SPONDENTS' PLEADINGS AND IN OP-
POSITION TO RESPONDENTS' CROSS
MOTION FOR SUMMARY JUDGMENT

Contents

Petitioners incorporate herein as affidavits in
support of their motions for summary judgment
and for judgment on the pleadings and to strike
respondents' pleadings and in opposition to re-
spondents' cross motion for summary judgment the
following to wit:

1. The original Application And Petition For A
Writ of Habeas Corpus filed herein by the petition-
ers on November 13, 1945, the same being verified by
one of the petitioners for and on behalf of each and

all of them, and being offered herein in lieu of filing separate affidavits of merit by each individual petitioner.

2. The Supplement and Amendment to Petition For Writ of Habeas Corpus filed herein March 4, 1946, verified for and on behalf of each petitioner herein, the same being offered herein in lieu of filing separate affidavits of merit by each individual petitioner.

3. The Amended Petition For Writ of Habeas Corpus filed herein August 15, 1946, the same being verified by one of the petitioners for and on behalf of each and all of them, and being offered herein in lieu of filing separate affidavits of merit by each individual petitioner.

4. The Traverse To Amended Return To Order To Show Cause filed herein October 10, 1946, the same being verified for *and behalf* of each petitioner herein and being offered herein in lieu of filing separate affidavits of merit by each individual petitioner.

The attached affidavits of the following persons, none of whom is a petitioner herein and none of whom is a renunciant, but each of whom is competent to be a witness in said proceeding, are offered in support of said motions:

1. Tetsujiro Nakamura.
2. Masami Sasaki.
3. Ernest Besig.
4. Rev. Thomas W. Grubbs.
5. Ann Ray.

for Affidavits of Tetsujiro Nakamura, page 225; Masami Sasaki, page 254; Ernest Besig, page 267; Rev. Thomas W. Grubbs, page 290, and Ann Ray, page 301, in support thereof.]

In the Southern Division of the United States District Court for the Northern District of California

No. 25296-S (Consolidated No. 25294-S)

In the Matter of the Application For A Writ of Habeas Corpus by TADAYASU ABO, et al., etc.,

Applicants, etc.

OBJECTIONS AND EXCEPTIONS TO AFFIDAVITS OF MERIT FILED BY RESPONDENTS AND MOTION TO STRIKE THE SAME

On November 12, 1946, the respondents filed herein the affidavits of John L. Burling, Charles M. Rothstein, Ollie Collins, Joseph J. Shevlin, Lillian C. Scott and Thomas M. Cooley II, including Exhibit A attached to the latter, said affidavits purporting to be affidavits of merit in opposition to petitioners' Motion For Summary Judgment and petitioners' Motion For Judgment On The Pleadings filed herein on October 14, 1946, and petitioners' Motion To Strike filed herein on October 10, 1946, and also purporting to be affidavits in support of respondents' cross-motion for summary judgment; and on December 5, 1946, respondents filed

herein in opposition to petitioners' said motions for summary judgment, for judgment on the pleadings and to strike and in support of respondents' cross motion for summary judgment the affidavit of Thomas M. Cooley II to which is attached Exhibits A, B and C and miscellaneous memoranda:

The petitioners and each of them hereby objects and excepts to the introduction in evidence herein of each phrase, clause, sentence and paragraph of each of respondents' said affidavits of merits, including the exhibits attached thereto, and to the whole of each of said affidavits and exhibits and objects and excepts to any consideration whatever being given thereto by the court on the pending motions and moves to strike the same for each and all of the following reasons and upon each and all of the following grounds, to-wit:

(Specific Objections)

The same is and are:

1. Opinions and conclusions of the affiant;
2. Hearsay;
3. A self-serving declaration;
4. Not part of the *res gestae*;
5. Not in issue herein;
6. Has no bearing on any issue herein;
7. Too remote to have any bearing on any issue herein;
8. Not the best evidence;
9. Is secondary evidence for the introduction of which no foundation has been laid;

10. Assumes something not in evidence;
11. Not binding on any petitioner herein;
12. Negative pregnant;
13. In conflict with admitted facts;
14. In conflict with facts of public notoriety of the truth of which the court has and takes judicial cognizance;
15. In conflict with the contents of pertinent public records; written instruments and official documents;
16. Attempts to alter or vary the terms of pertinent written instruments, public writing and official communications;
17. Not assertable by affiant who is estopped to assert the same because it is in conflict with facts admitted by the pleadings and with facts of public notoriety, and contrary to pertinent public writings and records and official communications and is an attempt to alter or vary the terms of those writings, records and communications by parole evidence and such are not impeachable by affiant;
18. Not matter observed or heard by affiant and not matter within his personal knowledge;
19. Sham;
20. Evasive;
21. Conjectural;
22. Vague;
23. Indefinite;
24. Uncertain;
25. Ambiguous;
26. Irrelevant;

27. Redundant;

28. Immaterial;

29. Affiant is not qualified to testify as an expert witness on the matter therein contained or to offer an affidavit herein on said matter;

30. No foundation has been laid for affiant to testify as an expert witness on the matter contained in his affidavit;

(General Objection)

And that the same is incompetent, irrelevant and immaterial;

(Special Objections To Special Exhibits)

In addition thereto each petitioner objects and excepts to the introduction in evidence herein and moves to strike each and every word, phrase, clause, sentence, paragraph and page of Exhibit A attached to the affidavit of Thomas M. Cooley II filed herein on November 12, 1946, purporting to be a memorandum of the Japanese Nationality Law as translated by one, Kenzo Takayanagai, and Exhibit B attached thereto and purporting to be a translation of sections of the Nippon Horei Zensho and the Kenko Horei Shuran, and also each and every word, phrase, clause, sentence, paragraph and page of Exhibit A attached to the affidavit of Thomas M. Cooley II filed herein on December 5, 1946, and purporting to be the affidavit of one, Thomas L. Blakemore, and Exhibit B attached thereto and purporting to be a memorandum prepared by said Thomas L. Blakemore, and Exhibit C attached thereto and purporting to be a deposition of said

Thomas L. Blakemore taken in a proceeding in the District Court of the United States for the Southern District of California, Northern Division, in a matter entitled "In the Matter of the Petition of Fumiko Tamura for a Writ of Habeas Corpus," No. 376-Civil therein, and miscellaneous photostat copies of a printed publication in the Japanese language attached thereto and Exhibit D attached thereto, and the whole of each of said affidavits and exhibits on each and all of the aforesaid reasons and grounds and upon the following additional and special grounds, to-wit:

The same is and are:

- a. Opinion and conclusion of such affiant;
- b. Hearsay of such affiant;
- c. Sham;
- d. Evasive;
- e. Conjectural;
- f. Vague;
- g. Indefinite;
- h. Uncertain;
- i. Ambiguous;
- j. Incompetent;
- k. Irrelevant;
- l. Immaterial;
- m. Self-serving;
- n. Unintelligible;
- o. No foundation has been laid for the introduction of the same into evidence;
- p. Said such affiant is not qualified as an expert

either in ability or proficiency to translate from the Japanese language into English;

q. Said such affiant is not qualified as an expert to testify as to the law or any law of Japan and in particular to the nationality laws of Japan, past or present;

r. Said document and the declarations and purported translations from Japanese to English therein are self-serving;

s. The Japanese law, including the Japanese nationality laws, are not in issue herein and have no application to any issue herein;

t. The law of Japan has no extraterritorial effect and cannot in anywise affect any citizen of the United States or any person residing within the United States;

u. The nationality law of Japan has no extraterritorial jurisdiction or effect over any citizen of the United States or resident of the United States;

v. The nationality law of Japan has no application whatever to any citizen of the United States or to any resident of the United States;

w. The said exhibits pertaining to purported laws of Japan are barred by the provisions of Title 8 USCA, sec. 800, and are inadmissible in evidence;

x. The said exhibits pertaining to purported laws of Japan are inconsistent with the grant of citizenship by the 14th Amendment and are contrary to the due process clause of the 5th Amendment and to the sovereignty of the United States and are barred from being introduced into evidence by reason thereof.

(General Objection)

And the same is and are incompetent, irrelevant and immaterial.

The above and foregoing special and general objections to the introduction of said affidavits and their contents in evidence on the pending motions herein and motions to strike the same are hereby submitted.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 18, 1946.

[See Transcript of Record in No. 12251, page 324, for Affidavit of Rosalie Hankey.]

[Title of District Court and Cause.]

OBJECTION AND EXCEPTIONS TO EVIDENCE, MOTION TO STRIKE SAME, AND MOTION TO SUPPRESS EVIDENCE ILLEGALLY OBTAINED

I.

The petitioners, and each of them, hereby object and except to the introduction in evidence herein of the affidavit of Thomas M. Cooley, II, dated Jan. 9, 1947, and annexed to the supplemental brief of respondents filed herein on Jan. 27, 1947, and to the affidavit of Rosalie Hankey dated Jan. 8, 1947, and filed herein on Jan. 23, 1947, to each and every part thereof, and object and except to any consideration and weight whatever being thereto by the

court on the pending motions of petitioners for summary judgment, for judgment on the pleadings and to strike, and move to strike the same for each and all of the following reasons and upon each and all of the following grounds, to-wit:

The same does not constitute the best evidence but is secondary evidence for which no foundation whatever has been laid; the same constitutes self-serving declarations; the same is composed of opinions and conclusions of the affiant and is hearsay; the same is vague, indefinite and uncertain; the same has no bearing on any issue herein; the same is an attempt to alter or vary the terms of written instruments by parole evidence; the same is in conflict with admitted facts and with facts which the respondents are estopped to deny and with facts of which the court takes judicial cognizance; the same relates to matters neither seen nor heard by nor within the personal knowledge of affiant; the same has no bearing upon any material issue involved herein; the same is not binding upon the petitioners or any of them; the same is sham; the same is vague, indefinite, uncertain and ambiguous; and the same is incompetent, irrelevant and immaterial;

II.

And petitioners and each of them object, except to and move to strike the affidavit of Thomas M. Cooley, II, dated January 6, 1947, filed herein on Jan. 9, 1947, and copy thereof annexed to the sup-

plemental brief for respondents containing a letter signed by O. P. Echols with an attached letter signed by J. M. Ebbitt, for each and all of the reasons and upon each and all of the grounds specified in paragraph No. I hereinabove and also upon the further ground that no opportunity, privilege or right of subjecting said J. M. Ebbitt, the signer of said attached letter dated 25 November 1946 addressed to the Adjutant General, to cross-examination on the matter therein contained exists or can be had by virtue of the fact that he is outside the jurisdiction of this court and country and is in Japan, to-wit conquered territory now under the dominion and control of the Allied Powers and General Douglas MacArthur and, therefore, cannot be subpoenaed or produced by petitioners for cross-examination on his qualifications as an expert in the Japanese language or as an expert on Japanese law or the purported statements of law contained therein; and upon the further grounds that the law of Japan has no extraterritorial effect and cannot affect any citizen of the United States or any resident of the United States; that said affidavit and its contents are barred by the provisions of Title 8 USCA, sec. 800, and are inconsistent with the grant of citizenship by the 14th Amendment and hence inadmissible in evidence.

III.

(Motion To Suppress)

And petitioners and each of them move the court to suppress and to strike the affidavit of Thomas M. Cooley, II, mentioned in paragraph I hereinabove upon the additional ground that the same purports to be a summary of purported statements made by certain petitioners and other persons which said statements were exacted and obtained from them illegally and unlawfully through the instrumentality of duress, coercion, undue influence and fraud exerted upon them and the duress in which they, at the time thereof, were held by the respondents and agents of the government and sundry pressure groups of persons operating in the concentration camps where they were falsely and illegally imprisoned by the government and its agents, all in violation of the provisions against illegal search and seizure guaranteed by the 4th Amendment, the due process clause of the 5th Amendment and the provision of the 5th Amendment against compelling any petitioner to a witness against himself.

Attention is directed to the fact that at the time said purported statements are purported to have been made each petitioner was a citizen of the United States who had been falsely arrested and then and there was illegally held in a concentration camp, subject to the duress complained of in the amended petition herein, for an unspecified crime without any charge or charges having been filed against him and without any hearing having been accorded him as provided for by the 6th Amend-

ment and the due process clause of the 5th and said statements so exacted from petitioners were not voluntary but were coerced and the said statements were and are false and inadmissible by reason thereof.

The above and foregoing objections and exceptions to the introduction of said affidavits and their contents in evidence on the pending motions herein and motion to strike and to suppress are herewith submitted.

Respectfully submitted,

/s/ WAYNE M. COLLINS,

Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 29, 1947.

[See Transcript of Record in No. 12251, page 403, for Affidavit of Thomas M. Cooley II and exhibits.]

In the United States District Court, for the Northern District of California, Southern Division

No. 25296-G (Consolidated No. 25294)

In the Matter of the Application for A Writ of Habeas Corpus by TADAYASU ABO, et al., etc.,

Petitioners, etc.

No. 25297-G (Consolidated No. 25294)

In the Matter of the Application for A Writ of Habeas Corpus by Mary Kaname Furya, et al., etc.,

Petitioners, etc.

ORDER GRANTING APPLICATIONS FOR WRIT OF HABEAS CORPUS

Applicants, all of whom are native born residents of the United States of Japanese ancestry, in the above two applications for writ of habeas corpus, assert that they are unlawfully held in custody by officers of the Department of Justice of the United States for removal and deportation to Japan.

By return filed to the applications, Irving F. Wixon, District Director of the Immigration and Naturalization Service of the Department of Justice of the United States for the Northern District of California, admits that the applicants are in custody for the purpose of removal and deportation to Japan as alien enemies of the United States, pursuant to the authority of the Alien Enemy Act of 1798, (50 USC 21-23) and Presidential Proclamations and Regulations of the Attorney-General issued thereunder.

Contemporaneously with the filing of the applications for the writ of habeas corpus, applicants filed actions in equity in this court, wherein they sought cancellation of alleged renunciations of American citizenship made by them, while in custody, pursuant to 8 USCA Sec. 801(i), upon the ground, *inter alia*, that such renunciations of citizenship were made under duress and hence are void. It is not alleged anywhere in the habeas corpus proceedings that applicants expatriated themselves in any other manner or under any other provision of law than Sec. 801(i).

Motions of respondent to strike and dismiss in

the equity and habeas corpus cases were argued before Judge St. Sure and, in July 1946, granted. Thereafter, further pleadings and motions were filed in all the cases, including motions for summary judgment by both applicants and respondent. On November 18, 1946, the several motions were submitted to Judge St. Sure for consideration and decision upon affidavits and briefs to be filed. Final brief of applicants was filed February 11, 1947. While these proceedings were pending before Judge St. Sure, he became ill and disabled from performing his duties. Thereafter and on February 20, 1947, with the consent of all parties and the judges of this court, the motions under submission to Judge St. Sure were ordered transferred and submitted to me for consideration, because of Judge St. Sure's continued illness. I have had them under study since submission, during such periods of time as, due to the pressure of continuous trial work, I have been able to give them attention.

The applications for the writ and the equity cases involve the determination of important issues of law which are of first impression.

The applications for the writ of habeas corpus bespeak priority of attention and I am ready to decide them, but will defer filing a written opinion setting forth my reasons for decision.

For reasons which will hereafter be given upon the decision of the equity cases, I am of the opinion that the detained applicants are not alien enemies within the provisions of the Alien Enemy Act of 1798 and hence may not be detained for removal

or deportation from the United States, pursuant to said Act.

Certain contentions of applicants as to the invalidity of the alleged renunciations of citizenship in the equity cases are also urged in support of the applications in the habeas corpus proceedings. It is not necessary to now determine these contentions because I would rule that applicants are not alien enemies whether the alleged renunciations are valid or invalid.

It is asserted in the return of Director Wixon that many of the applicants were and have been disloyal to the United States. But this is not a ground for deportation under the Alien Enemy Act of 1798, except as to persons who are alien enemies under its provisions.*

*The purpose of § 801(i) was not to provide the basis for deportation of applicants, but "for the purpose of devising a system of controlling the disloyal" . . . , the government, at the time, having no Constitutional means, absent martial law, of so doing as to American Citizens. (Affidavit of John L. Burling of the Alien Enemy Control Unit of the War Division of the Department of Justice, page 10, attached to motion for Summary Judgment.)

The applications for the writ of habeas corpus of all the applicants named are therefore granted.

Dated: June 30, 1947.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed June 30, 1947.

[Title of District Court and Cause.]

RESPONDENTS' MOTION TO VACATE ORDER GRANTING APPLICATIONS FOR WRIT OF HABEAS CORPUS, FOR RECONSIDERATION OF RESPONDENTS' CROSS MOTION FOR SUMMARY JUDGMENT, AND FOR ORDER GRANTING SAME; and MEMORANDUM IN SUPPORT THEREOF; and NOTICE OF MOTION

The respondents move the Court as follows:

1. To vacate its order granting application for writ of habeas corpus entered herein on June 30, 1947.
2. To reconsider the respondents' cross motion for summary judgment.
3. To grant the respondents' cross motion for summary judgment and to enter judgment dismissing the petition.

In support of this motion respondents urge that the Court erred in its order entered herein on June 30, 1947 in holding that the detained applicants are not alien enemies within the provisions of the Alien Enemy Act of 1798, as more fully explained in their memorandum in support hereof.

TOM C. CLARK,
Attorney General.

By /s/ HERBERT A. BERGSON,
Acting Assistant Attorney
General.

FRANK J. HENNESSY,
United States Attorney.

ROBERT B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for
Respondents.

Of counsel:

/s/ ENOCH E. ELLISON,
Attorney, Department of
Justice.

NOTICE OF MOTION

To the above named Petitioners and to their attorney, Wayne M. Collins, Esq., 1721 Mills Tower, San Francisco, California:

Please Take Notice that the undersigned will bring the above motion on for hearing before the above entitled Court, at Room 258, United States Courthouse and Post Office Building, Seventh and Mission Streets, San Francisco, California, on the 14th day of July, 1947, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Said motion will be made on the grounds and for the reasons stated in said motion, and will be based on said order of the Court of June 30, 1947, on all

the pleadings and files in the above proceedings,
and on said motion and this notice.

Dated: July 7, 1947.

TOM C. CLARK,
Attorney General.

By HERBERT A. BERGSON,
Acting Assistant Attorney
General.

FRANK J. HENNESSY,
United States Attorney.

All by /s/ ROBERT B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for
Respondents.

Of counsel:

ENOCH E. ELLISON,
Attorney, Department of
Justice.

Receipt of copy acknowledged.

[Endorsed]: Filed July 8, 1947.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25296-G Cons. No. 25294-G

In the Matter of the Application For A Writ of
Habeas Corpus by TADAYASU ABO, et al.,
etc.,

Applicants, etc.

OPPOSITION TO RESPONDENT'S MOTION
TO VACATE ORDER GRANTING APPLI-
CATIONS FOR WRIT OF HABEAS
CORPUS, FOR RECONSIDERATION OF
CROSS-MOTION FOR SUMMARY JUDG-
MENT AND FOR ORDER GRANTING
SAME

Petitioners oppose respondent's motion to vacate the order granting the applications for the writ of habeas corpus, for reconsideration of respondent's cross-motion for summary judgment and order granting the same and dismissing the petition.

In opposition to respondent's said motion the petitioners assert that this Court properly decided the case and did not err in granting said applications for the writ and pray that respondent's motion be denied.

Dated: July 11, 1947.

/s/ WAYNE M. COLLINS,

Attorney for Petitioners.

[Endorsed]: Filed July 11, 1947.

[Title of District Court and Cause.]

NOTICE OF DENIAL OF MOTION

To the Respondents and Counsel for Respondents:

You and each of you will please take notice that on Monday, August 4, 1947, respondents' motion to vacate order granting applications for writ of habeas corpus, for reconsideration of respondents' cross motion for summary judgment, and for order

granting same was denied by a minute order of the above-entitled Court made and entered on August 4, 1947.

Dated: August 7, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 7, 1947.

In the United States District Court for the Northern District of California, Southern Division

No. 25296-G (Consolidated No. 25294)

In the Matter of the Application for A Writ of Habeas Corpus by Tadayasu Abo, et al., etc.

Petitioners, etc.

No. 25297-G (Consolidated No. 25294)

In the Matter of the Application for A Writ of Habeas Corpus by Mary Kaname Furya, et al., etc.,

Petitioners, etc.

MEMORANDUM DECISION DENYING RESPONDENTS' MOTIONS TO VACATE ORDER GRANTING APPLICATIONS FOR WRIT OF HABEAS CORPUS

In the order of court granting the petitions for writ of habeas corpus, I stated that the detained applicants are not alien enemies within the provisions of the Alien Enemy Act of 1798 and hence could not be detained for deportation. I further

stated that the reasons for decision would be given in an opinion to be filed at the time of decision of the equity suits brought by petitioners. Respondents, in their motions to reconsider and vacate the order granting the writ, have indicated that they have been handicapped in presenting the motions because of lack of knowledge of the nature of the court's reasons for its conclusion. I will therefore briefly indicate the basis of the decision.

Admittedly all of petitioners were, at the time of their alleged renunciations of citizenship, native born citizens of the United States residing therein. The basis of their detention by respondents is that prior to and at the time of the alleged renunciations, petitioners were also citizens of Japan and that therefore they automatically became citizens of Japan when the alleged renunciations were effected. The court unequivocally rejects the concept of dual citizenship asserted by respondents. The theory that a native born resident American can at the selfsame time be an alien and a citizen of a foreign state, is, in my opinion, judicially wholly unsound. An American citizen as such, owes his entire allegiance to the United States and the United States is entitled to claim from him an indivisible loyalty. A naturalized citizen, at the time of naturalization renounces all allegiance to any foreign government and swears undivided fealty to the United States. No less is the allegiance of a native born citizen, for the Constitution makes no distinction between naturalized and native born

citizens. It is Constitutionally impossible for a resident citizen of the United States to have at the same time any allegiance to any foreign government.*

Possession of Japanese citizenship, in Japan, by a native born resident American citizen of Japanese ancestry, does not, upon renunciation of American citizenship in the United States, convert that person into an alien until he has voluntarily departed from this country. An alien is defined to be "one born out of the United States, and who has not been naturalized under their constitution and laws." *Low Wah Suey v. Backus*, 225 U.S. 460, 473; 2 Kent 50; 1 Bouvier Law Dictionary 3d Rev. 172. It is true that the term "alien" has been extended to apply to a native born United States citizen who has lost his American citizenship by removal to and acquisition of the citizenship of a foreign country. *Reynolds v. Haskins*, 8 F. 2d 473.

*The dual citizenship concept in the field of international law (with which we are not here concerned) has to do with situations in which two different sovereigns may lawfully, within their respective territorial confines, claim citizenship of the same person, and he of them, and the international incidents and implications which result. *Talbot v. Jansen*, 3 Dall. 131, 164; *Perkins v. Elg*, 307 U.S. 325. But that such person may occupy a dual citizenship status, in the sense that he possesses simultaneously the citizenship of the sovereign state in which he is a domiciled native and that of a foreign sovereign as well, with all the attendant rights and obligations of both, is a principle to which no government would willingly subscribe.

It is also true that the Alien Enemy Act broadly applies to "natives, citizens, denizens, or subjects" of a hostile nation or government. "Nevertheless, absent any express declaration of Congressional intent, there is no justification for *hold-that* under the Alien Enemy Act, a native born resident American citizen, who renounces his American citizenship pursuant to Sec. 801(i), may be deported, at least as long as he continues to reside here.

All that the expatriation statute (including § 801(i)) purports to effect is termination of American citizenship. It in no way fixes or determines any particular alien nationality for the expatriate.

By its terms, the Alien Enemy Act applies to subjects of hostile countries who are found within the United States and are "not actually naturalized." (50 USC § 21) Petitioners' status is obviously not within the scope of Section 21.

Assuming the petitioners' renunciations to be valid, they would cease to be American Citizens, but they would not thereby acquire an alien citizenship, which they could not lawfully theretofore have possessed.

The motions to vacate and reconsider are denied, and I will therefore sign the orders for the issuance of the writ.

Dated: August 11, 1947.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug. 11, 1947.

[Title of District Court and Cause.]

RESPONDENTS' SECOND MOTION TO VACATE ORDER GRANTING APPLICATIONS FOR WRIT OF HABEAS CORPUS, FOR RECONSIDERATION OF RESPONDENTS' CROSS MOTION FOR SUMMARY JUDGMENT, AND FOR ORDER GRANTING SAME

The Respondents move the Court as follows:

1. To vacate its order granting application for writ of habeas corpus entered herein on June 30, 1947.
2. To reconsider Respondents' cross motion for summary judgment, and
3. To grant Respondents' cross motion for summary judgment and to enter judgment dismissing the petitions.

In support of this motion, Respondents urge that the Court erred in its order entered herein on June 30, 1947, in holding that the detained applicants are not alien enemies within the provisions of the Alien Enemy Act of 1798. Since the Court has not yet announced its reasons for so holding this motion assumes *arguendo* that the Court may have concluded for some reason that legal effect can not properly be given the Japanese citizenship of the petitioners. Submitted herewith in support of this motion is an affidavit of Charles M. Rothstein, Acting Director, Alien Enemy Control Unit, Department of Justice, showing that many of the petition-

ers voluntarily proclaimed their Japanese citizenship at the time of their renunciation hearings in response to the question of why they wished to renounce their United States citizenship.

TOM C. CLARK,
Attorney General.

By PEYTON FORD,
Assistant Attorney General.
FRANK J. HENNESSY,
United States Attorney.

ROBERT B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for
Respondents.

Of Counsel:

/s/ ENOCH E. ELLISON,
Attorney, Department of
Justice.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 8, 1947.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25296-G

In the Matter of the Application For A Writ of
Habeas Corpus by TADAYASU ABO, et al.,
etc.,

Petitioners, etc.

OPPOSITION TO RESPONDENTS' SECOND
MOTION TO VACATE ORDER GRANTING
APPLICATIONS FOR WRIT OF HABEAS
CORPUS

Petitioners oppose Respondents' Second Motion To Vacate The Order Granting Applications For Writ of Habeas Corpus, For Reconsideration Of Respondents' Cross Motion For Summary Judgment And Order Granting Same.

In opposition to respondents' said second motion the petitioners assert that this Court properly denied respondents said like first motion and properly decided the case and did not err in granting the applications for the writ and therefore pray that respondents' second motion be denied.

Dated: August 11, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

POINTS AND AUTHORITIES IN SUPPORT
OF PETITIONERS' OPPOSITION TO RE-
SPONDENTS' SECOND MOTION

In opposition to respondents' second motion the petitioners incorporate herein their Points and Authorities heretofore filed in support of their opposition to respondents' first motion to vacate order granting applications for writ of habeas

corpus and those heretofore filed in support of their motion for judgment on the pleadings and for summary judgment.

It is respectfully submitted that the respondents' second motion should be denied.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 11, 1947.

[Title of District Court and Cause.]

NOTICE OF ORDER DENYING MOTION

To Respondents and Their Attorneys:

You and each of you will please take notice that on the 11th Day of August, 1947, your Second Motion To Vacate Order Granting Applications For Writ of Habeas Corpus, For Reconsideration Of Respondents' Cross Motion For Summary Judgment And Order Granting Same heretofore submitted to the above-entitled Court for decision was denied by an order of the above-entitled Court duly made and entered herein.

Dated: 11th Day of August, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 11, 1947.

[Title of District Court and Cause.]

NOTICE OF ORDER DENYING RESPONDENTS' MOTIONS AND GRANTING PETITIONERS' MOTIONS AND RELEASING PETITIONERS FROM RESPONDENTS' CUSTODY AND AWARDING WRIT OF HABEAS CORPUS AND ORDERING ITS ISSUANCE

To Respondents in the Above-Entitled Proceeding
and to Their Attorneys:

You and each of you will please take notice that by an order of the above-entitled Court duly made and entered herein on the 11th Day of August, 1947, respondents' motions for summary judgment to strike and to dismiss the amended petition were denied and petitioners' motions for summary judgment and for judgment on the pleadings were granted and the petitioners were awarded and granted their application and petition for writs of habeas corpus commanding respondents to liberate the detained petitioners from detention and to restore them to their liberty.

Dated: August 11, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 11, 1947.

[Title of District Court and Cause.]

ADMISSION OF SERVICE OF
COPY OF ORDER

Receipt of a copy of the order of the above-entitled Court of August 11, 1947, denying respondents' motions and granting petitioners' motions and releasing petitioners from respondents' custody and awarding writ of habeas corpus and ordering its issuance is hereby admitted this 11th Day of August, 1947.

TOM C. CLARK,
Attorney General.

PEYTON FORD,
Asst. Atty. Gen.,

FRANK J. HENNESSY,
U. S. Attorney,

By /s/ ROBERT B. McMILLAN,
Asst. U. S. Atty.,
Attorneys for
Respondents.

[Endorsed]: Filed Aug. 11, 1947.

[Title of District Court and Cause.]

ORDER DENYING RESPONDENT'S MO-
TIONS AND GRANTING PETITIONERS'
MOTIONS AND RELEASING PETITION-
ERS FROM RESPONDENT'S CUSTODY
AND AWARDING WRIT OF HABEAS
CORPUS AND ORDERING ITS ISSUANCE

The motions of the respective parties herein heretofore having been submitted to this Court for decision and having been duly considered by this Court,

It Is Ordered that the respondent's motion for summary judgment, to strike and to dismiss the amended petition be and they hereby are denied;

It Is Ordered that the petitioners' motions for summary judgment and for judgment on the pleadings be and they hereby are granted;

It Is Ordered that each of the petitioners now detained by the respondent be released from respondent's custody and be restored to his or her liberty and the respondent is ordered forthwith to release the said petitioners and each of them from his custody and control and to restore them to their liberty, and

It Is Ordered that the application for the writ of habeas corpus sought herein by each of the petitioners now detained by or under the authority of or in the custody of the respondent be granted and it is ordered that a writ of habeas corpus issue out of and under the seal of this Court directed to the respondent Irving F. Wixon, as the District Director of the Northern District of California for the Immigration and Naturalization Service of the Department of Justice of the United States, commanding him forthwith to release each of the petitioners now detained by him from his custody and to restore them to their liberty and that, if he fails so to do, commanding him to have the body of each of the petitioners now detained by him or under his

authority or in his control before the above-entitled Court, in the courtroom of said Court, 2nd Floor, Post Office Building, 7th and Mission Streets, San Francisco, California, on Monday, the 8th day of September, 1947, at the hour of 10 o'clock A.M. of said day to do and receive what then and there shall be considered concerning the said petitioners and each of them, and that he have then and there the said writ.

Dated: August 11th, 1947.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug. 11, 1947.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25296-G Cons. No. 25294-G

In the Matter of the Application For A Writ of
Habeas Corpus by TADAYASU ABO, et al.,

Applicants,

And

TADAYASU ABO, et al., etc.,

Petitioners,

vs.

IRVING F. WIXON, District Director, etc.,
Respondent.

WRIT OF HABEAS CORPUS

The President of the United States of America to
Irving F. Wixon, as the District Director of
the Northern District of California for the Im-
migration and Naturalization Service of the
Department of Justice of the United States,
Respondent, Greeting:

You are hereby commanded to release forthwith
from your custody and restore to his or her liberty
each of the petitioners in the above-entitled pro-
ceeding now detained by you or under your author-
ity or in your custody and, in the event that you
fail so to do you are commanded to have the body
of each of the said petitioners now detained by you
or under your authority or in your custody before
the above-entitled Court, in the courtroom of said
Court, 2nd Floor, Post Office Building, 7th and
Mission Streets, San Francisco, California, on Mon-
day, the 8th day of September, 1947, at the hour of
10 o'clock A.M. of said day, then and there to do,
submit to and receive whatsoever the said Court
shall then and there consider in that behalf; and
have you then and there this Writ.

Witness the Honorable United States District
Court For The Northern District of California,
this 11th day of August, 1947.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ L. C. JACOBSEN,
Deputy Clerk.

Return on Service of Writ

United States of America,
Northern District of California—ss:

I hereby certify and return that I served the annexed Writ of Habeas Corpus on the therein-named Irving F. Wixon, District Director, Immigration by handing to and leaving a true and correct copy thereof with Irving F. Wixon personally at San Francisco, Calif. in said District on the 11th day of August, A. D. 1947.

GEORGE VICE,

U. S. Marshal.

By /s/ DIAMOND T. McCARTHY,
Deputy.

MD # 26777

[Endorsed]: Filed Aug. 14, 1947.

[Title of District Court and Cause.]

ORDER AND CONSENT
(Order)

Whereas the Court is informed that the respondent may take an appeal from its decision discharging from the custody of the respondent those among the petitioners who, as of the date of this order, are restrained of their liberty by him and whereas the production of said petitioners in person before this Court on September 8, 1947, in compliance with the writ of habeas corpus heretofore issued herein not only would invoke a hardship upon them but would cause a needless expense to be borne by the United States and, therefore, is deemed by the parties hereto to be unnecessary and

Whereas said petitioners move the Court to be released to the custody of Wayne M. Collins, Esq., their counsel, pending the taking of any such appeal by the respondent and thereafter during the pendency of any such appeal, conditioned that if such an appeal be taken that they and each of them will appear to answer, comply with and abide by the final decision in such appellate proceedings and whereas the respondent herein and the Attorney General of the United States consent to their release to the custody of Wayne M. Collins, their counsel, upon such conditions, as appears from the executed consent form below,

It Is Ordered that petitioners' said motion be granted.

Dated: September 8th, 1947.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

(Consent)

Upon the signing and filing of the above order of Court the respondent and the Attorney General of the United States, without prejudice to respondent's right of appeal in the above cause, consent to release to the custody of Wayne M. Collins, Esq., petitioners' counsel, upon the conditions specified in the above form of order, those among the petitioners who now are restrained of their liberty by the respondent or said Attorney General and, in addition thereto, consent to parole to the custody of said Wayne M. Collins, Esq., those plaintiffs in actions Nos. 25294 and 25295, pending in the above-

entitled Court and consolidated with habeas corpus proceedings Nos. 25296 and 25297 likewise pending therein, who, as of the date hereof, likewise are detained by them but who are not parties to either of said habeas corpus proceedings, and also to parole to said Wayne M. Collins those certain other United States born persons of Japanese ancestry now detained by said Attorney General, or under his order, who are neither parties to said action No. 25294 or 25295 nor to said proceeding No. 25296 or 25297 but who similarly are detained at the Alien Internment Camp at Crystal City, Texas, or at Seabrook Farms, Inc., Bridgeton, New Jersey, and further

Said Attorney General consents to provide the transportation costs and expenses of those among the above-mentioned persons who now are detained at said Alien Internment Camp at Crystal City, Texas, from their said place of detention to their homes in San Francisco or Los Angeles, Calif.

Dated: September 6th, 1947.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ ROBERT B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for Respondent.

[Endorsed]: Filed Sept. 8, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named respondent hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered in the above-entitled matter on August 11, 1947, granting a writ of habeas corpus for the release of each of the above-named petitioners; and from the orders made and entered therein on said day denying respondent's motions for summary judgment, to strike and dismiss the amended petition, and granting petitioners' motions for summary judgment and for judgment on the pleadings.

Dated: San Francisco, California, September 8, 1947.

TOM C. CLARK,
Attorney General.

PEYTON FORD,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ ROBERT B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for said
Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 8, 1947.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the above entitled Court, and to
Wayne M. Collins, Esq., attorney for appli-
cants:

The above named respondent, by his attorneys
herein, hereby designates for inclusion in the tran-
script of record upon appeal the complete record
and all the proceedings in the action.

Dated: October 3, 1947.

TOM C. CLARK,
Attorney General.

PEYTON FORD,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ ROBERT B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for said
Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 3, 1947.

[Title of District Court and Cause.]

STIPULATION AND ORDER THEREON EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING CAUSE IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT (Rule 73(g).)

It Is Hereby Stipulated that the time of the above named respondent for filing record on appeal and for docketing the above entitled action on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in pursuance of notice of appeal heretofore filed by said respondent, be extended to and including the 6th day of December, 1947.

Dated: October 3, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Applicants.

TOM C. CLARK,
Attorney General.

PEYTON FORD,
Assistant Attorney General.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ ROBERT B. McMILLAN,
Assistant U. S. Attorney.
Attorneys for said
Respondent.

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
CAUSE IN THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

On reading the foregoing stipulation, and on application of Tom C. Clark, Attorney General, Peyton Ford, Assistant Attorney General, Frank J. Hennessy, United States Attorney, and Robert B. McMillan, Assistant United States Attorney, attorneys for the above named respondent, and good cause appearing therefor;

Now, Therefore, It Is Ordered that the time of respondent for filing of record on appeal and for docketing the above entitled action on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in pursuance of notice of appeal heretofore filed by said respondents on September 8, 1947, be, and the same is hereby extended to and including the 6th day of December, 1947.

Dated: October 3, 1947.

/s/ LOUIS GOODMAN,
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 3, 1947.

[Title of District Court and Cause.]

PETITIONERS' DESIGNATION OF ADDITIONAL CONTENTS TO BE INCLUDED IN RECORD ON APPEAL

To the Clerk of the above entitled Court, to Respondents, and to Tom C. Clark, Attorney General, and Frank J. Hennessy, U. S. Attorney, Attorneys for Respondents (Appellants):

The applicants and petitioners, appellees herein, designate as additional portions of the record, proceedings and evidence for inclusion in the record on appeal herein the following, to-wit: the affidavits, including the exhibits incorporated therein and annexed thereto, filed in support of their motion for summary judgment and for judgment on the pleadings, and also the original complaint, the supplement and amendment to complaint and the amended complaint which were specifically incorporated and offered as affidavits of merit on said motions.

Dated: October 10, 1947.

/s/ WAYNE M. COLLINS,
Attorney for Petitioners.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 10, 1947.

In the United States Court of Appeals
For the Ninth Circuit

No. 25296-G (Consolidated No. 25294)

In the Matter of the Application for A Writ of
Habeas Corpus by TADAYASU ABO, et al.,
etc.,

Petitioners, etc.

No. 25297-G (Consolidated No. 25294)

In the Matter of the Application for A Writ of
Habeas Corpus by MARY KANAME FURYA,
et al., etc.,

Petitioners, etc.

STIPULATION AND ORDER THEREON EX-
TENDING TIME TO FILE AND DOCKET
RECORD ON APPEAL

It Is Stipulated between the parties hereto that
the time within which appellants (respondents be-
low) may file and docket the record on appeal
herein may be and hereby is extended to and includ-
ing the 1st day of March, 1949.

Dated: December 28, 1948.

TOM C. CLARK,
Attorney General.

FRANK J. HENNESSY,

U. S. Attorney.

By ,

ROBERT B. McMILLAN,

Assistant U. S. Attorney.

Attorneys for Appellants.

(Petitioners below)

..... ,

WAYNE M. COLLINS,

Attorney for Appellees.

(Petitioners below)

Time extended as stipulated.

WM. DENMAN,

Chief Judge.

[Endorsed]: Filed Dec. 28, 1948.

PAUL P. O'BRIEN,

Clerk:

A True Copy.

Attest: Dec. 28, 1948.

PAUL P. O'BRIEN,

Clerk.

[Seal] By /s/ FRANK SCHMID,

Deputy Clerk.

[Endorsed]: Filed Dec. 28, 1948, U.S.D.C.

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled, and that they constitute the Record on Appeal herein as designated by the parties:

Petition for Writ of Habeas Corpus.

Order to Show Cause.

Order Appointing Next of Friend and Guardian
Ad Litem for Minor Applicants and Petitioners.

Stipulation.

Order.

Order to Show Cause.

Withdrawal and Dismissal.

Withdrawal and Dismissal.

Stipulation to Inclusion of Additional Applicants
and Petitioners as Parties to Suit.

Order Joining Parties Applicant and Petitioners.

Stipulation and Order.

Stipulation and Order.

Stipulation and Order.

Stipulation and Order.

Supplement and Amendment to Petition for Writ
of Habeas Corpus.

Stipulation and Order to Inclusion of Additional
Parties as Petitioners in Suit.

Stipulation and Order Re Production of Petitioners.

Stipulation and Order Extending Time.

Stipulation and Order to Inclusion of Additional Parties as Petitioners In Suit.

Stipulation and Order to Inclusion of Additional Parties in Suit.

Stipulation and Order Extending Time, Etc.

Motion to Strike.

Points and Authorities in Support of Motion to Strike.

Stipulation and Order Extending Time.

Petitioners' Points and Authorities in Opposition to Respondent's Motion to Strike.

Stipulation and Order Extending Time.

Stipulation and Order Extending Time.

Stipulation and Order Extending Time.

Memorandum Supplemental to Points and Authorities in Support of Motion to Strike.

Order.

Stipulation and Order Extending Time.

Stipulation and Order.

Amended Petition for Writ or Habeas Corpus.

Stipulation and Order.

Motion to Strike.

Return.

Stipulation to Rejoinder of a Party Respondent.

Order Joining a Party Respondent.

Voluntary Dismissal of a Party Petitioner Without Prejudice.

Amended Return.

Motion to Strike.

Traverse to Amended Return to Order to Show Cause.

Morition for Summary Judgment That Writ of Habeas Corpus Be Awarded and Issue Commanding Production of Petitioners in Court There to be Discharged From Custody Without Hearing Being Required.

Motion For Judgment on the Pleadings That Writ of Habeas Corpus Be Awarded and Issue Commanding Production of Petitioner in Court There To Be Discharged From Custody Without Hearing Being Required.

Notice of Hearing of Motions.

Respondent's Points and Authorities in Opposition to Petitioners' Motion to Strike.

Respondent's Points and Authorities in Opposition to Petitioners' Motion for Judgment on the Pleadings.

Respondent's Points and Authorities in Opposition To Complainants' Motion for Summary Judgment and Cross Motion for Summary Judgment.

Brief for Respondent.

Brief for Petitioners.

Petitioners' Affidavits in Support of Their Motions For Summary Judgment and For Judgment on the Pleadings and to Strike Respondents' Pleadings and In Opposition to Respondents' Cross Motion for Summary Judgment.

Objections and Exceptions to Affidavits of Merit

Filed by Respondents and Motion To Strike The Same.

Affidavit of Thomas M. Cooley, II, dated January 6, 1947.

Affidavit of Rosalie Hankey.

Objection and Exceptions to Evidence, Motion to Strike Same, and Motion to Suppress Evidence Illegally Obtained.

Plaintiff's Supplemental Memorandum.

Affidavit of Thomas M. Cooley II.

Order Granting Applications for Writ of Habeas Corpus.

Order Granting Stay of Execution of Writ of Habeas Corpus.

Order Granting Stay of Execution of Writ of Habeas Corpus.

Respondents' Motion to Vacate Order Granting Applications for Writ of Habeas Corpus, for Reconsideration of Respondents' Cross Motion for Summary Judgment, and for Order Granting Same; and Memorandum in Support Thereof; and Notice of Motion.

Opposition to Respondent's Motion to Vacate Order Granting Applications for Writ of Habeas Corpus, for Reconsideration of Cross-Motion for Summary Judgment and for Order Granting Same.

Order Granting Stay of Execution of Writ of Habeas Corpus.

Notice of Denial of Motion.

Re Orders of the Attorney General Releasing Certain Petitioners.

Memorandum Decision Denying Respondents' Motions to Vacate Order Granting Applications for Writ of Habeas Corpus.

Respondents' Memorandum in Support of Section Motion to Vacate Order Granting Applications for Writ of Habeas Corpus, for Reconsideration of Respondents' Motion for Summary Judgment and for Granting Same.

Respondents' Section Motion to Vacate Order Granting Applications for Writ of Habeas Corpus, for Reconsideration of Respondents' Cross Motion for Summary Judgment, and for Order Granting Same.

Affidavit of Charles M. Rothstein.

Opposition to Respondents' Second Motion to Vacate Order Granting Applications for Writ of Habeas Corpus.

Notice of Order Denying Motion.

Notice of Order Denying Respondents' Motions and Granting Petitioners' Motions and Releasing Petitioners from Respondents' Custody and Awarding Writ of Habeas Corpus and Ordering Its Issuance.

Admission of Service of Copy of Order.

Order Denying Respondent's Motions and Granting Petitioners' Motions and Releasing Petitioners from Respondent's Custody and Awarding Writ of Habeas Corpus and Ordering Its Issuance.

Writ of Habeas Corpus.

Order and Consent.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Stipulation and Order Thereon Extending Time for Filing Record on Appeal and Docketing Cause in the United States Circuit Court of Appeals for the Ninth Circuit (Rule 73(g).)

Petitioners' Designation of Additional Contents to Be Included in Record on Appeal.

Stipulation and Order Thereon Extending Time to File and Docket Record on Appeal.

Reporter's Transcript for July 5, 1946.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 28th day of February, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12195. United States Court of Appeals for the Ninth Circuit. Irving F. Wixon, District Director, Immigration and Naturalization Service, Appellant, vs. Tadayasu Abo, et al., etc., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 28, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12195

IRVING F. WIXON, District Director, Immigration and Naturalization Service,

Appellant,

vs.

TADAYASU ABO, et al., etc.,

Appellees.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

1. Concise Statement of the Points on Which Appellant Intends to Rely (Rule 19, Subdivision 6).

2. Designation of Record (Rule 19, Subdivision 6).

A concise statement of the points on which appellant intends to rely on this appeal and review is the following:

1. The District Court erred in holding that appellees, because they were born in the United States, could not, upon renunciation of United States citizenship, become alien enemies within the provisions of the Alien Enemy Act of 1798 (Act of July 6, 1798, 1 Stat. 577, 50 U.S.C. Sec. 21, et seq.), and hence, that they can not lawfully be detained for removal or deportation from the United States pursuant to said Act.

2. The District Court erred in holding that a native born resident American citizen of Japanese ancestry can not, at the same time, be a citizen of

Japan, and hence, upon renunciation of American citizenship in the United States such person does not become an alien until he has voluntarily departed from the United States.

3. The District Court erred in holding that no native born resident American citizen who renounced his American citizenship pursuant to Section 801 (Act of July 1, 1944, 54 Stat. 1168; 8 U.S.C. 801) may be removed from the United States pursuant to said Alien Enemy Act of 1798 as long as he continues to reside in the United States.

Appellant designates all of the record, excepting all Briefs and Memoranda of Points and Authorities, as material to the consideration of this appeal.

Dated: March 1, 1949.

TOM CLARK,

Attorney General.

H. G. MORISON,

Assistant Attorney General

/s/ FRANK J. HENNESSY,

U. S. Attorney.

ENOCH E. ELLISON,

Special Assistant to the
Attorney General.

PAUL J. GRUMBLY,

Attorney,

Department of Justice,

Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Mar. 1, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION TO DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL TO BE
PRINTED

Filing Date

Names and Addresses of Attorneys.

11-13-45 Petition for Writ of Habeas Corpus, with
its Exhibits, but omit listing of all of
petitioners' names and substitute the fol-
lowing therefor,

“TADAYASU ABO, et al., . . . , adults, individu-
ally, and as constituting a class, and as
representatives of a class,

and

GENSHYO AMBO, et al., . . . , minors, individu-
ally, and as constituting a class, and as
representatives of a class, by HARRY
UCHIDA, as the next of friend and as
guardian ad litem of them and each of
them, Applicants and Petitioners.”

11-13-45 Order Appointing Next of Friend and
Guardian Ad Litem for Minor Applicants
and Petitioners.

11-23-45 Stipulation.

11-23-45 Order.

11-13-45 Order to Show Cause.

12-31-45 Stipulation and Order.

1- 2-46 Stipulation and Order.

Filing Date

- 3- 4-46 Supplement and Amendment to Petition
for Writ of Habeas Corpus.
- 3-14-46 Stipulation and Order re Production of
Petitioners.
- 7-15-46 Motion to Strike (omitting Points and
Authorities).
- 7-11-46 Order.
- 8-15-46 Amended Petition for Writ of Habeas
Corpus.
- 9-19-46 Motion to Strike (omitting Points and
Authorities).
- 9-23-46 Return.
- 10- 4-46 Amended Return.
- 10-10-46 Motion to Strike.
- 10-10-46 Traverse to Amended Return to Order to
Show Cause.
- 10-14-46 Motion for Summary Judgment that
Writ of Habeas Corpus be Awarded and
Issue Commanding Production of Peti-
tioners in Court there to be Discharged
from Custody Without Hearing Being
Required.
- 10-14-46 Motion for Judgment on the Pleadings
that Writ of Habeas Corpus be Awarded
and Issue Commanding Production of
Petitioners in Court There to be Dis-
charged from Custody Without Hearing
Being Required (omitting Points and
Authorities).
- 10-16-46 Notice of Hearing of Motions.
- 11-12-46 Respondents' Points and Authorities in

Filing Date

Opposition to Complainants' Motion for Summary Judgment and Cross Motion for Summary Judgment, omitting therefrom paragraph A and its subsections I, II, III, IV and V, but print only Paragraph B, subsection I and prayer thereof which is the cross motion, and then print the following notation:

[See Transcript of Record in No. 12251 for Affidavits of following: John L. Burling, page 147; Charles M. Rothstein, page 210; Ollie Collins, page 213; Joseph J. Shevlin, page 216, and Lillian C. Scott, page 219, in support of Motion.]

12-11-46 Petitioners' Affidavits in Support of Their Motion for Summary Judgment and for Judgment on the Pleadings and to Strike Respondents' Pleadings and in Opposition to Respondents' Cross Motion for Summary Judgment, and then print the following notation:

[See Transcript of Record in No. 12251 for Affidavits of following: Tetsujiro Nakamura, page 225; Masami Sasaki, page 254; Ernest Besig, page 267; Rev. Thomas W. Grubbs, page 290; and Ann Ray, page 301, in support thereof.]

12-18-46 Objections and Exceptions to Affidavits of Merits Filed by Respondents and Motion to Strike the Same.

1-23-47 Print notation: [See Transcript of Rec-

Filing Date

- ord in No. 12251, page 324, for Affidavit of Rosalie Hankey.]
- 1-29-47 Objections and Exceptions to Evidence, Motion to Strike Same, and Motions to Suppress Evidence Illegally Obtained.
- 3-24-47 Print notation: [See Transcript of Record in No. 12251, page 403, for Affidavit of Thomas M. Cooley II and exhibits.]
- 6-30-47 Order Granting Applications for Writ of Habeas Corpus (please place pages thereof in proper numerical sequence).
- 7- 8-47 Respondents' Motion to Vacate Order Granting Applications for Writ of Habeas Corpus, for Reconsideration of Respondents' Cross Motion for Summary Judgment, and for Order Granting Same. (Omit Respondents' Memorandum in Support of Motion.)
- 7-11-47 Opposition to Respondents' Motion to Vacate Order Granting Applications for Writ of Habeas Corpus, for Reconsideration of Cross Motion for Summary Judgment and for Order Granting Same. (Omit Points and Authorities.)
- 8- 7-47 Notice of Denial of Motion.
- 8-11-47 Memorandum Decision Denying Respondents' Motion to Vacate Order Granting Applications for Writ of Habeas Corpus.
- 8- 8-47 Respondents' Second Motion to Vacate Order Granting Applications for Writ of Habeas Corpus, for Reconsideration of

Filing Date

- Respondents' Cross Motion for Summary Judgment, and for Order Granting Same.
- 8-11-47 Opposition to Respondents' Second Motion to Vacate Order Granting Applications for Writ of Habeas Corpus.
- 8-11-47 Notice of Order Denying Motion.
- 8-11-47 Notice of Order Denying Respondents' Motions and Granting Petitioners' Motions and Releasing Petitioners from Respondents' Custody and Awarding Writ of Habeas Corpus and Ordering Its Issuance.
- 8-11-47 Admission of Service of Copy of Order.
- 8-11-47 Order Denying Respondents' Motions and Granting Petitioners' Motions and Releasing Petitioners from Respondents' Custody and Awarding Writ of Habeas Corpus and Ordering Its Issuance.
- 8-14-47 Writ of Habeas Corpus and Return on Service of Writ.
- 9- 8-47 Order and Consent.
- 9- 8-47 Notice of Appeal.
- 10- 3-47 Designation of Contents of Record on Appeal.
- 10- 3-47 Stipulation and Order Extending Time for Filing Record on Appeal and Docketing Cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Filing Date

10-10-47 Petitioners' Designation of Additional Contents to be Included in Record on Appeal.

12-28-48 Stipulation and Order Extending Time to File and Docket Record on Appeal.
Certificate of Clerk to Record on Appeal.
This Stipulation.

Dated: June 27th, 1949.

H. G. MORISON,
Assistant Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

PAUL J. GRUMBLY,
Attorney,
Department of Justice,

By /s/ FRANK J. HENNESSY,
U. S. Attorney.
Attorneys for Appellants.

/s/ WAYNE M. COLLINS,
Attorney for Appellees.

[Endorsed]: Filed June 27, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It is stipulated between the parties hereto, by their respective counsel, that whereas the whole of the record on appeal herein is identical with that in appeal proceeding No. 12196, now pending in the above-entitled Court and entitled "Tom Clark, as Attorney General of the United States, et al., Appellants, vs. Mary Kaname Furuya, et al., etc., Appellees," with the exception of the names of the party appellee therein and the parties appellee herein and the parties appellee herein, and

Whereas all the issues of fact and of law which may be determined on the appeal herein are identical with those involved in said appeal proceeding No. 12196, save and except as such determination of such issues of fact and of law may or shall affect the individual appellee in said appeal proceeding No. 12196,

It Is Stipulated that the Transcript of Record in said appeal proceeding No. 12196 need not be printed on said appeal, unless the same hereafter may be required for the convenience of the Court where pending, but remain in typewritten form as filed and docketed in the above-entitled Court and be held in abeyance pending a final judicial determination of this appeal and, in the event that the final decision of court on this appeal proves to be dispositive of the issues of fact and of law involved

in said appeal proceeding No. 12196 that the final judicial decision herein shall also be the final judicial decision therein on said issues of law and of fact and that such decision thereon may be entered therein.

Dated: June 27th, 1949.

H. G. MORISON,
Assistant Attorney General.

FRANK J. HENNESSY,
U. S. Attorney.

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

PAUL J. GRUMBLY,
Attorney,
Department of Justice,

By /s/ R. B. McMILLAN,
Assistant U. S. Attorney,
Attorneys for Appellants.

/s/ WAYNE M. COLLINS,
Attorney for Appellees.

So Ordered: July 1, 1949.

/s/ WILLIAM HEALY,
U. S. Circuit Judge.

/s/ WM. E. ORR.

[Endorsed]: Filed July 18, 1949.

Nos. 12195 and 12196

**In the United States Court of Appeals
for the Ninth Circuit**

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION
AND NATURALIZATION SERVICE, APPELLANT

v.

TADAYASU ABO, ET AL., ETC., APPELLEES

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION
AND NATURALIZATION SERVICE, APPELLANT

v.

MARY KANAME FURUYA, ET AL., ETC., APPELLEES

*ON APPEALS FROM ORDERS OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE NORTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION*

BRIEF FOR APPELLANT

FILED

JUN 17 1958

PAUL P. O'BRIEN,

CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 12195

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION
AND NATURALIZATION SERVICE, APPELLANT

v.

TADAYASU ABO, ET AL., ETC., APPELLEES

No. 12196¹

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION
AND NATURALIZATION SERVICE, APPELLANT

v.

MARY KANAMA FURUYA, ET AL., ETC., APPELLEES

*ON APPEALS FROM ORDERS OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE NORTHERN DISTRICT OF CALI-
FORNIA, ISSUING WRITS OF HABEAS CORPUS*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The Orders of the United States District Court for the Northern District of California granting writs of habeas corpus were entered on August 11, 1947 (R. 191-194) and notices of appeal were filed September 8,

See footnote on p. 2.

1947 (R. 198).¹ This Court has jurisdiction to review the orders of the District Court under Title 28, United States Code, Section 2253.

QUESTION PRESENTED

Whether the Court below properly held that appellees' (hereinafter referred to as petitioners) status was not that of citizens or subjects of Japan and therefore not within the scope of the provisions of the Alien Enemy Act of 1798 (50 U. S. C. § 21).

STATUTES INVOLVED

The pertinent provisions of the Alien Enemy Act of 1798 (50 U. S. C. § 21) and those of § 403 (a) of the Nationality Act of 1940, as amended by the Act of July 1, 1944 (58 Stat. 677; 8 U. S. C. 803 (a)) are set forth in the Appendix *infra* pp. 34-35. Section 401 (i) of the Nationality Act of 1940 as amended by the Act of July 1, 1944 (58 Stat. 677; 8 U. S. C. 801 (i)), is as follows:

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: * * * Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever

¹ By stipulation and order (R. 219) the Transcript of Record in No. 12196 was not printed on appeal and is held in abeyance pending a final judicial determination of the appeal in No. 12195, and in the event that the final decision of the Court on No. 12195 proves to be dispositive of the issues of fact and of law involved in No. 12196, the final judicial decision herein shall also be the final judicial decision therein on said issues of law and fact. Accordingly, all record references are to No. 12195.

the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; * * *

STATEMENT ²

This is an appeal by the appellant (hereinafter referred to as respondent) Bruch G. Barber, District Director of Immigration and Naturalization Service, as successor in office to Irving F. Wixon, from an order made and entered on August 11, 1947, by the Honorable Louis E. Goodman, United States District Judge, granting a Writ of Habeas Corpus for the release of each of the petitioners and from the Orders made and entered on that same day denying respondent's motions for summary judgment, to strike and dismiss the amended petition, and granting petitioners' motion for a summary judgment and for a judgment on the pleadings (R. 191-193).³

² This Statute, together with certain other permanent wartime laws, was rendered inoperative by the Joint Resolution of July 25, 1947, c. 327, Sec. 3, 67 Stat. 451 (Public Law 239, p. 7, 80th Cong., 1st Sess.) However, for the purposes of removing those appellees still under Removal Order, a state of war still exists between United States and Japan. *Ludecke v. Watkins*, 335 U. S. 160.

³ On June 30, 1947, the District Court entered an order granting applications for the Writ of Habeas Corpus of petitioners (R. 175-177). The respondent filed motions to Reconsider and Vacate the aforesaid Order of June 30, 1947 (R. 178; 186-187). The Motions to Vacate and Reconsider were denied by the Court (R. 182-185) and the Court issued a Writ of Habeas Corpus addressed to Irving F. Wixon as the District Director of the Northern District of California for the Immigration and Naturalization Service ordering the petitioners released from his custody and restored to their liberty (R. 195).

The petitioners filed an amended petition for a Writ of Habeas Corpus in the Court below on August 15, 1946 (R. 99), praying that the same be issued and directed to respondent, Ivan Williams, as the officer in charge of the United States Department of Justice of the Immigration and Naturalization Service of the Tule Lake Center, commanding him to release the said petitioners from his custody and to restore them to their liberty.

In the amended petitions for the Writ of Habeas Corpus it is alleged that each petitioner is a person of Japanese ancestry born in the United States and resident in the Northern District of California, and that none of them ever was or is an alien enemy, an alien, or a native, citizen, denizen or subject of Japan or of any hostile or foreign nation (R. 100-101). The respondent in an amended return admitted that each of the petitioners was a person of Japanese ancestry, a native domiciliary of the United States and a resident of the Northern District of California, but asserted that each petitioner was an alien and a citizen and subject of Japan and that the Attorney General had made a finding of dangerousness as to each petitioner acting within his powers pursuant to the Alien Enemy Act of 1798, and the Presidential Proclamations 2525 and 2655 and the Regulations issued by him thereunder (R. 134-135). The respondent denied that any of the petitioners were then citizens or nationals of the United States or that any of them were loyal to the United States and further admitted that each of the petitioners was interned and held under Order of Removal from the United States by the

Attorney General acting pursuant to the Alien Enemy Act of 1798 and the Presidential Proclamations and Regulations cited above.⁴

In the amended petitions for a Writ of Habeas Corpus the petitioners also requested that the Court find and adjudge that their renunciations of United States nationality were null, void and of no effect and that any approval thereof made by the Attorney General of the United States was and is null, void and of no effect (R. 127). The respondent admitted that the petitioners renounced their United States Citizenship but asserted that each was approved by the Attorney General as required by statute and regulation and that each of said renunciations was valid and legally effective (R. 136).

On October 10, 1946, the petitioners filed a Motion to Strike certain matter from the amended return (R. 145-148) and on that same day filed a traverse to matters contained in the amended return specifically denying, among other things, that the petitioners or any of them were aliens or citizens, or subjects of Japan (R. 149-153). On October 14, 1946, the petitioners filed Motions for Summary Judgment and Judgment on the Pleadings that a Writ of Habeas Corpus be awarded and issued to them (R. 154-157) and respondent on November 12, 1946, filed Points and Authorities in opposition to petitioners' Motion for

⁴ Except as to 302 petitioners the cause has long been moot due to administrative action cancelling the removal orders under which appellees were held. See designation of plaintiffs set forth in the appendix to the Appellants' brief in No. 12251 at pp. 6-11.

Summary Judgment and in support of his Cross Motion of Summary Judgment (R. 161).

In an Order granting applications for a Writ of Habeas Corpus on June 30, 1947, the District Court rendered an opinion that the petitioners were not alien enemies under the Alien Enemy Act of 1798 and hence could not be held for removal or deportation from the United States, pursuant to the said Alien Enemy Act (R. 175). In so ruling the Court held that it was not necessary to determine the alleged invalidity of the renunciations of citizenship of petitioners urged in support of the applications in the Habeas Corpus proceeding (R. 175-177). Respondent's Motions to Vacate the Order granting applications for Writ of Habeas Corpus and reconsideration of their Cross Motion for Summary Judgment and for Order granting the same were denied on August 11, 1947 (R. 182-185). The District Court held that appellees were not citizens or subjects of Japan, an enemy country, within the provisions of the Alien Enemy Act of 1798 (50 U. S. C. § 21) and that, consequently, they could not be removed or deported under that Act, at least, as long as they continued to reside in the United States. Orders for the issuance of the Writ were made on August 11, 1947 (R. 182-185; 191-193).

Such denial of respondents' motions and the issuance of the Writ of Habeas Corpus were predicated upon the holding of the District Court that petitioners, because they were born in the United States could not, upon renunciation of United States Citizenship, become alien enemies within the purview of the Alien

Enemy Act of 1798, since a native born resident American citizen of Japanese ancestry could not at the same time be a citizen of Japan and that, hence, upon renunciation of American citizenship in the United States such person did not become an alien until he had voluntarily departed from the United States. The Court further held that no native born resident American citizen, who renounced his American citizenship pursuant to Section 801 (i), may be removed from the United States pursuant to the said Alien Enemy Act of 1798 as long as he continues to reside in the United States (R. 182-185).⁵

SPECIFICATION OF ERRORS RELIED UPON

The District Court erred:

(1) In holding that appellees, native born resident American citizens of Japanese ancestry, could not at the same time, be citizens of Japan.

(2) In holding that appellees upon renunciation of their American citizenship in the United States, did not become aliens unless and until they had voluntarily departed from the United States.

(3) In holding that the appellees, upon renunciation of United States citizenship did not become alien enemies under the provisions of the Alien Enemy Act of 1798 (50 U. S. C. Sec. 21) and hence could not be lawfully detained for removal for deportation from the United States pursuant to said Act.

(4) In holding that appellees, being native born citizens of the United States, could not, subsequent to their renunciation of American citizenship pursuant

⁵ This decision is officially reported at 76 F. Supp. 664.

to Section 401 (i) of the Nationality Act of 1940 as amended (Act of July 1, 1944, 58 Stat. 677; 8 U. S. C. 801 (i)) be removed from the United States pursuant to the said Alien Enemy Act of 1798 as long as they continued to reside in the United States.

SUMMARY OF ARGUMENT

I. Petitioners were native-born citizens of the United States of Japanese ancestry who renounced their American citizenship pursuant to the provisions of Title 8, U. S. C. § 801 (i). They were interned as dangerous alien enemies subsequent to their renunciations, on the ground that they had been dual nationals and continued to possess their Japanese citizenship; hence were alien enemies subject to internment and removal under the Alien Enemy Act of 1798 and Presidential Proclamations 2525 and 2655. Petitioners were subsequently released from such internment by the District Court upon the ground that a native-born resident American citizen cannot at the same time have any allegiance to any foreign government. It is submitted that the Court was in error because in so holding it, in effect, rejected the doctrine set forth in *Perkins v. Elg*, 307 U. S. 325, which held that as municipal law determined the acquisition of citizenship, it followed that a person could possess a dual nationality. This proposition is supported by holdings of this and other courts and is universally subscribed to by the authoritative writers on the subject.

II. The District Court, in arriving at its decision that petitioners were not citizens of Japan subsequent

to their renunciations of American citizenship, reasoned that it would be necessary for them voluntarily to depart from this country in order to become citizens of Japan and thus alien enemies. It is well established that Congress has the power to prescribe regulations for expatriation and to legislate the results flowing therefrom. It has on former occasions utilized this power to prescribe that if a native-born American citizen undertook certain acts, he would, as a result thereof, become an alien without the necessity of voluntarily departing from the United States. The exercise of this power has been consistently approved by the courts. It is therefore submitted that the District Court was in error in holding that it was necessary for these petitioners voluntarily to depart from the United States before they become Japanese citizens and, therefore, at the time of the approval of their renunciations by the Attorney General while they were resident in the United States they became alien enemies.

III. The District Court recognized that, as a matter of law, voluntary departure might not be necessary to convert native-born American citizens into aliens under certain circumstances, but stated that absent any express declaration of congressional intent, there was no justification for holding that persons born in the United States who renounced their citizenship under § 801 (i) became aliens while resident in the United States. Although there is no such express declaration in subsection (i), it is submitted that its legislative history clearly indicates that one of the purposes of Congress in enacting this legislation was

to permit dual nationals, such as the petitioners, to be interned and removed as alien enemies subsequent to their voluntary, formal written renunciations of United States nationality. It is well settled that the function of a court in the interpretation of a statute is to construe the language thereof so as to give effect to the intent of Congress, and that in determining such intent resort may be had to the legislative history. We submit that the intention of Congress in enacting § 801 (i), *supra*, is clear. It was to permit the renunciation of the American citizenship of dual nationals in order that such persons, desiring to do so, might thereby assume the role of alien enemies and hence, become subject to the provisions of the Alien Enemy Act. In preventing this intended operation of the Act, the District Court clearly erred.

ARGUMENT

I. The issue of dual nationality

Petitioners were, at the time of their renunciation of American citizenship, native born United States citizens of Japanese ancestry residing in the United States. After the execution and approval of their renunciations of United States citizenship by the Attorney General, they were interned and held under orders of removal issued by him on the ground that persons who possessed both Japanese and United States citizenship (R. 131, 135, 183), became alien enemies, and, hence, subject to the Alien Enemy Act of 1798 (50 U. S. C. § 21), upon casting off their American citizenship. They were interned as a result of a finding of dangerousness as to each of them by the

Attorney General acting within his powers pursuant to the Alien Enemy Act of 1798, the Presidential Proclamations 2525 and 2655 and the Regulations issued by him thereunder (10 F. R. 12189).

The respondent's concept of dual citizenship and its implications, namely, that prior to and at the time of their renunciation of American citizenship petitioners were also at the same time citizens of Japan and continued to be citizens of Japan when their alleged renunciations of American citizenship were effected, was unequivocally rejected by the District Court on the ground that the theory that a native born resident American citizen can at the selfsame time be an alien and citizen of a foreign state was "judicially wholly unsound," (R. 183). In further commenting upon the respondent's concept of dual citizenship the Court stated as follows (R. 184):

The dual citizenship concept in the field of international law (with which we are not here concerned) has to do with situations in which two different sovereigns may lawfully, within their respective territorial confines, claim citizenship of the same person, and he of them, and the international incidents and implications which result. *Talbot v. Jansen*, 3 Dall. 131, 164; *Perkins v. Elg*. 307 U. S. 325. But that such person may occupy a dual citizenship status, in the sense that he possesses simultaneously the citizenship of the sovereign state in which he is a domiciled native and that of a foreign sovereign as well, with all the attendant rights and obligations of both, is a principle to which no government would willingly subscribe.

It is submitted that in expressing such opinion, the District Court was in error. In *Perkins v. Elg*, 307 U. S. 325, 329, the Supreme Court had occasion to discuss the principle of dual nationality. The facts of that case show that Miss Elg was born in the United States in 1907. Her parents, natives of Sweden, immigrated to the United States and her father was naturalized here in 1906. In 1911 her mother took her to Sweden where she continued to reside until 1929. Her father went to Sweden in 1922 and in 1934 made a statement before an American Consul in Sweden that he had voluntarily expatriated himself for the reason that he did not desire to retain the status of an American citizen and wished to preserve his allegiance to Sweden. In 1929 Miss Elg returned to the United States and was admitted as a citizen. In 1935 she was notified by the Department of Labor that she was an alien illegally in the United States and was threatened with deportation. In 1936 she applied for an American passport, but it was refused by the Secretary of State upon the ground that she was not a citizen of the United States. She began an action for a Declaratory Judgment on the ground that she was a citizen of the United States. The defendant moved to dismiss the complaint asserting that the plaintiff was not a citizen of the United States by virtue of the Naturalization Convention and Protocol of 1869 between the United States and Sweden (17 Stat. 809) and the Swedish Nationality Law, and Section 2 of the Act of Congress of March 2, 1907, 8 U. S. C. 17. The Supreme Court

in discussing the principles of dual nationality stated at page 329 as follows:

As municipal law determines how citizenship may be acquired it follows that persons may have a dual nationality, and the mere fact that the plaintiff may have acquired a Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she had lost her own citizenship acquired under our law.⁶

Manifestly, therefore, the existence of a dual nationality and citizenship results from the operation of municipal law, and in many instances, including the instant case, it is for application by municipal, as distinguished from international, tribunals. It is also apparent from such statement that dual citizenships may be possessed simultaneously. Consequently, it is incorrect to say, as the District Court said, that a person may not simultaneously possess the citizenship of two sovereign states. The question in *Perkins v. Elg, supra*, was whether Miss Elg was subject to deportation, hence, as in the present case, there was clearly presented a question of municipal law. The question presented in the instant case is that of the authority of the Attorney General to interne and remove petitioners from this country on the ground that they are alien enemies. The answer to it depends, in part, upon the solution of the subordinate problems

⁶ That a person may at the same time enjoy the rights of citizenship under 2 governments was early recognized in the case of *Talbot v. Jansen*, 3 Dall. 133, 169.

raised by the dual citizenship and right of expatriation of appellees. It is clearly a question of municipal law.⁷

The recognition of the existence of dual citizenship as affected by the application of the municipal law of this country is aptly illustrated by a number of cases in which courts recognized that a person could be at once a citizen of the United States and a national or citizen of a foreign country. The opinion in *Attorney General of the United States v. Ricketts*, C. A. 9, 165 F. (2d) 193, commences with the following language:

This case presents a problem of dual nationality as affected by the provisions of the Nationality Act of 1940, 8 U. S. C. A. § 801.

In that case the Court stated at p. 195 that:

By virtue of his American birth and the later naturalization of his father in Canada he was *at once* (italics supplied) a citizen of the United States and a Canadian national. His American citizenship was deemed to continue unless

⁷ See, also, Moore, *International Law Digest*, volume III, p. 518; Hyde, *International Law*, vol. I, § 372; Borchard, *Diplomatic Protection of Citizens Abroad*, §§ 253-256; Van Dyne, *Citizenship of the United States*, pp. 20-25; 34-36; Oppenheim's *International Law*, vol. I, 1948 ed., p. 593; Fenwick, *International Law*, 3d ed., pp. 253-255; Hackworth, *Digest of International Law*, vol. III, § 255; Gettys, *The Law of Citizenship in the United States*, pp. 27-30; Flourinay, *Dual Nationality and Election*, 30 Yale Law Journal, 546, 696-697. Even if it were conceded that the problem of dual citizenship here presented emanated solely from the field of International Law, it is also true that International Law is a part of our law for the application of its own principles, *The Paquete Habana*, 175 U. S. 677, 700; *Skiriotos v. Florida*, 313 U. S. 69, 72-73.

he had been deprived of it through the operation of a treaty or Congressional enactment, or by his "voluntary action in conformity with applicable legal principles."

Similar recognition of the simultaneous possession, by persons born in the United States, or its outlying possessions, of American and Japanese citizenship is to be found in *United States v. Yasui*, 48 F. Supp. 40, 55, D. C. Oregon (modified 320 U. S. 115, as not being necessary for decision); *Okihara v. Clark*, D. C. Hawaii, 71 F. Supp. 319, 322; *Ishikawa v. Acheson*, D. C. Hawaii, 85 F. Supp. 1. See also *Podea v. Marshall*, D. C. Pa. 83 F. Supp. 216, 219, *Cf. Coumas v. Superior Court, San Joaquin County*, Sup. Ct. of Cal. 192 P. (2d) 449.

The rejection by the District Court of the respondent's concept of dual nationality is primarily predicated upon its unwillingness to accept the theory that an American citizen can, at the same time owe any allegiance to a foreign government. The court also stated that no nation or government would willingly subscribe to the principle that a person may be a dual citizen in the sense that he possesses simultaneously the citizenship of the sovereign state in which he is a domiciled native and that of a foreign sovereign state, with all the attendant rights and obligations of both (R. 183-184).⁸ It is submitted that if such a view were accepted it would be tantamount to a refusal to recog-

⁸ That the Court's observation is not entirely correct would seem to be indicated by the provisions of Chapter 17 of the British Nationality and Status of Aliens Act, 1914, 4, 5 George V, vol. 52, Law Reports (Statutes, 1914), pp. 36-37. Section 14 (I) of that Act provides as follows: "Any person who by reason of his

nize the existence of the problem by the mere assertion that the problem does not exist.⁹ The accepted authorities on this phase of dual citizenship state that from the very fact that every state has the right to determine by its own law who shall be entitled to its citizenship, conflicts of law result and it frequently happens that a person has a dual nationality. In

having been born within his Majesty's dominions and allegiance * * * is a natural born British subject, but who at his birth or during his minority became under the law of any foreign State a subject also of that State, and is still such a subject, may, if of full age and not under disability, make a declaration of allegiance, and on making the declaration shall cease to be a British subject." By Section 7 of Chapter 14 of the British Nationality and Status of Aliens Act of 1943 (Law Reports, 1943, Stats. 6, 7, and 8 George VI, 1943) such declaration of alienage was not effective unless registered in accordance with regulation and, if made during war, unless it was registered with the permission of the Secretary of State. (The similarity between these statutes and 801 (i) of Title 8 U. S. C. is notable.) A form of such declaration of allegiance is set forth in the Appendix B. For an interpretation of the 1914 Statute and presumably the cause of the 1943 amendment to The Status of Aliens Act see *Rex v. Commanding Officer* (K. B. Div.), vol. XXXIII, The Times Law Report, pp. 252-253.

⁹ Pursuant to Presidential Executive Order No. 6115 of April 25, 1933, an inter-agency committee composed of the Secretaries of State and Labor and the Attorney General, submitted on June 1, 1938, a proposed codification of the nationality laws of the United States, which code, as subsequently modified and amended by Congress, became the Nationality Act of 1940. The letter of submittal contained in pertinent part the following language: "The nationality problem in the United States is especially complex and difficult for several reasons. * * * Children born in the United States to persons of the class mentioned [persons of foreign origin having children born to them in the United States] acquire at birth citizenship of the United States, and in many cases they also acquire at birth the nationality of the foreign States from which their parents come, thus becoming vested with dual nationality."

respect to all persons as to whose nationality a difference of legal theory exists, international law has made no choice and it is left open to States to act as they like. As in conflicts of law in relation to other matters, States have shown a disposition to relax sovereign rights and have made mutual concessions by which the effects of conflicts of law in regard to nationality are to a considerable extent avoided. *Van Dyne, Citizenship of the United States*, p. 24.

The same view is held by Moore, who states:

The doctrine of double allegiance, though often criticized as unphilosophical, is not an invention of jurists but is the logical result of the concurrent operation of two different laws. In the absence of a general agreement for the exclusive application, according to circumstance, of the one or the other of such laws, the condition that actually exists is described by the term double allegiance. An undisputed example of it is furnished by the case of a child, who, by reason of his parents being at the time of his birth in a foreign land, is born a citizen of two countries—a citizen of the country of his birth *jure soli* and a citizen of his parents' country, *jure sanguinis*. It is true that in such a case a double claim of allegiance potentially may not arise. For instance, the country of birth may not claim the allegiance of the child born on its soil to alien parents * * *. But if the conditions be otherwise and a double claim actually exists it is considered to have a valid foundation. A conflict, however, is obviated by the rule that the liability of the child to the performance of

the duties of allegiance is determined by the laws of that one of the two countries in which he actually is." Moore, *International Law Digest*, vol. III, P. 518.

It would seem from an examination of these authorities that double allegiance, even in the case of a native-born American citizen can exist as a matter of law; that the State in which a particular dual national is resident may, but is not required to, claim his exclusive allegiance. However, the fact that exclusive allegiance may be claimed while resident, does not in itself negate the existence of the possession by the person of citizenship of another country.¹⁰ Although by the law of the United States a person born in the United States of alien parents is considered a citizen of the United States, it is also true that the United States considers as citizens of this country, having equal status, persons who are born outside of the United States, and its outlying possessions, of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such persons, 54 Stat. 1138; 8 U. S. C. § 601 (c). In such a case, although the United States considers such a person to be a citizen of the United States, it does not deny the possibility

¹⁰ For an excellent discussion of the problems arising out of the possession of dual citizenship see Buell, *Some Legal Aspects of the Japanese Question*, 17 Am. Jour. of Int. Law 29. The author, at p. 34, defines expatriation to be the act by which a person divests himself of citizenship in one nation and accepts, *if he does not already hold*, citizenship in another. [Italics supplied.]

of the simultaneous possession by such a person of another citizenship. *Van Dyne, Citizenship of the United States*, pp. 34-36. It is therefore apparent that the recognition by the United States, that by the law of Japan persons born in the United States of Japanese citizen parents are also Japanese citizens in certain cases,¹¹ even though the allegiance of such person who is resident in the United States *may* be exclusively claimed by this government, does not prevent the United States as a sovereign from waiving at any particular time a demand for continued exclusive allegiance even though such a person is a resident of the United States. It is submitted that

¹¹ The affidavits of Thomas M. Cooley II, dated respectively November 7 and December 3, 1946, submitted as part of Respondent's Points and Authorities in opposition to complainant's Motion for Summary Judgment and Cross Motion for Summary Judgment had annexed thereto memoranda setting forth the appropriate provisions of Japanese law which established that under Japanese law many of the appellees possessed Japanese nationality. Because of their length they are not being set forth herein nor have they been printed in the transcript of record pursuant to stipulation of the parties approved by this Court. The parties also stipulated that these documents need not be printed and that the same might be examined and considered by the Court, which stipulation was approved by this Court. For authoritative expression of the nationality laws of Japan, existing on December 7, 1941, see Flournay and Hudson, *Nationality Laws*, 1929, 381-388; Blakemore, *Recovery of Japanese Nationality as Cause for Expatriation in American Law*, July 1949, 43 *American Journal of International Law*, 441, 459. See also 10 *American Journal of International Law* 367 and *Foreign Relations of the United States*, vol. II, 1924, p. 411. The District Court's memorandum supporting its Order granting the Writ of Habeas Corpus tacitly assumed that by the law of Japan, appellees possessed, according to Japanese law, Japanese citizenship (R. 184).

an attribute of sovereignty is the power to sanction a voluntary abandonment of allegiance to it and the recognition of a claim of allegiance by another sovereign from a person who under such other sovereign's law is also its citizen. In the case of *The Exchange*, 7 Cranch 116, Chief Justice Marshall stated at p. 136:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. * * * all exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself * * * this consent may be either expressed or implied. In the latter case, it is less determinate; exposed more to the uncertainties of construction; but if understood not less obligatory.

The District Court in rejecting appellees' concept of dual citizenship ascribed as a reason for so doing that:

An American citizen as such owes his entire allegiance to the United States and the United States is entitled to claim from him an indivisible loyalty. A naturalized citizen at the time of naturalization renounces all allegiance to any foreign government and swears undivided fealty to the United States. No less is the allegiance of a native-born citizen, for the Constitution makes no distinction between naturalized and native-born citizens (R. 183).

In addition to what has already been said with respect to (a) judicial recognition of the possession by

American citizens of a dual citizenship and allegiance, (b) the right to claim sole allegiance of a dual citizen while resident within the territory of a sovereign and (c) the power of such sovereign to waive such claim to allegiance, it seems that there is a distinction to be drawn between the cases of citizens born in the United States of alien parents and those persons born abroad who have obtained naturalization as citizens of this country. Secretary of State Lansing in a communication to Senator Lodge of June 9, 1915, states that, in the former cases, the Department of State recognizes that the persons concerned are born with a dual nationality and in the latter the Department did not recognize the existence of dual nationality in view of the fact that persons naturalized as citizens of this country are required to renounce their original allegiance, Hyde, *International Law*, vol. I, p. 665. It would seem that such a distinction is valid. See, 8 U. S. C. § 800.

We submit that appellees, in view of the foregoing authorities, even though native-born resident Americans, could be and were at one and the same time citizens of Japan and of the United States.

II. The issue of necessity of voluntary departure from the United States

In view of the Court's premise that native born resident American citizens could not at the selfsame time be a citizen of a foreign state, in this instance Japan, the portion of the Court's opinion which states that a native born American citizen who renounced his citizenship could not be an alien until he

had voluntarily departed from this country, logically follows, since the Court does not consider any legal incidents to flow from the possession of Japanese citizenship until the person arrives within the territorial limits of Japan or at least until he has departed from the territory of the United States. Therefore, if the Court's premise is correct it, perforce, could be conceded that its conclusions predicated thereon are also correct. Of course, as hereinbefore indicated, no such concession is made, since it is the respondent's position that appellees possessed Japanese citizenship not only while they were residents within the territorial limits of Japan but also while resident in the United States. We do not understand the Court's reference to the requirement for voluntary departure from this country, as meaning that the same is necessary to terminate American citizenship by one who had voluntarily renounced the same pursuant to the provisions of Title 8 U. S. C. 801 (i) *supra*.¹² As we read the Court's opinion a voluntary departure is, however, required in

¹² It is assumed that the Court was freely conversant with the provisions of Section 803 (a) Title 8 U. S. C., which by its terms authorizes expatriation under Section 801 (i) *supra*, while within the United States or any of its outlying possessions. Congress in enacting such provision obviously intended to circumvent the common law requirement of actual removal from a country in order to legally effectuate expatriation, i. e., the voluntary renunciation or abandonment of nationality; and allegiance as enunciated in such cases as *Talbot v. Jansen*, 3 Dall. 133; *The Santissima Trinidad*, 7 Wheat. 283, 346; *Comitis v. Parkerson*, 56 Fed. 556; *Ex parte Griffin*, D. C. N. Y., 237 Fed. 445, 450, see also *Fish v. Stoughton*, 2 Johnson's Cases 407 (N. Y. 1801), Cf. *U. S. ex rel de Cicco v. Longo*, D. C. Conn. 45 F. Supp. 170-174.

order to vitalize appellees' Japanese citizenship, and thereby create for them the status of aliens.

However, it can not be doubted that Congress has the power to prescribe regulations for expatriation and to legislate the results, with respect to citizenship, flowing therefrom, providing only that the same shall not be arbitrarily imposed without express or implied consent of the citizen. *Mackenzie v. Hare*, 239 U. S. 299, 311; *Petition of Peterson*, 33 F. Supp. 615-616; *United States ex rel Wrona v. Kornuth*, 14 F. Supp. 770-771. This power has been judicially approved in instances so as to permit citizens of the United States upon the voluntary accomplishment of stated acts, to become aliens while resident in the United States and without the necessity of voluntarily departing to the country whose citizenship has been acquired by such act. Conversely, Congressional power has been recognized to encompass the declaration that aliens residing in foreign countries may acquire United States citizenship under certain circumstances without ever residing in the United States. An instance of the first type of Congressional enactment mentioned above is to be found in the Act of March 2, 1907, c. 2534, 34 Stat. 1226, whereby it is provided that any American woman, who married a foreigner should take the nationality of her husband. At the termination of the marital relation, she might, under the statute, resume her American citizenship from abroad by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if

residing in the United States at the termination of the marital relation, by continuing to reside therein.¹³

The power of Congress to so convert a citizen of the United States into an alien without such person's departure from the United States is expressly approved in *Mackenzie v. Hare, supra*. The Court, in so deciding, stated at pp. 311-312:

As a government the United States is invested with all the attributes of sovereignty. As it has the character of nationality, it has the power of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.
 * * * We concur with counsel that citizenship is of tangible worth. * * * But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment.

See also *In re Chamorra*, D. C. Cal., 298 Fed. 669-670.

Section 2 of the Act of 1907, 34 Stat. 1228, provided that any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws or when he has taken an oath of allegiance to any foreign state. The statute in express terms did not provide that such naturalization or the taking of an oath of allegiance to any foreign state would effect the expatriation of a United States citizen, if such acts were accomplished while he resided in the United States. This Act was recently construed by the United States Court of Ap-

¹³ This section of the Act is repealed by Amendment of September 22, 1922, 42 Stat. 1021 (The Cable Act).

peals for the 7th Circuit in *Savorgnan v. United States*, 171 F. (2d) 155. In that case the plaintiff voluntarily obtained Italian citizenship while residing in the United States and the Court held that she had expatriated herself pursuant to the provisions of Section 2 of the Act of 1907 *supra*, and that a subsequent removal from this country was not necessary to effect such expatriation. A reading of such decision clearly indicates that the plaintiff in that case became an alien and that voluntary removal from this country was not necessary to produce such a status.

The second instance mentioned above, the power of Congress to convert an alien into a citizen of the United States without such person ever entering the United States, is illustrated by Section 2 of the Act of February 10, 1855 (§ 1994 Rev. St.) which provided that any woman who was married to a citizen of the United States and who might herself be lawfully naturalized shall be deemed a citizen.¹⁴ That alien women married to United States citizens subsequent to passage of such Act became citizens of the United States, even though they never entered the territorial limits of the United States subsequent to such marriage, was held by respectable authority, *Kelly v. Owen*, 7 Wall. 496; *Burton v. Burton*, 1 Keys 359; *Lenard v. Grant*, 5 Fed. 11; 14 Op. A. G. 402, 406.

The District Court in holding that "possession of Japanese citizenship in Japan by a native born resident American of Japanese ancestry" who renounced his

¹⁴ Repealed by Act of September 22, 1922, 42 Stat. 1021 (Cable Act).

citizenship under Section 401 (i) is not converted into an alien unless he voluntarily departed from the country, is evidently predicated in part upon the Court's rigid adherence and acceptance of a definition of the word "alien" to be, "One born out of the United States and who has not been naturalized under their constitution and laws" (R. 184). Of course, if that were the only possible definition of the word "alien" the appellees would not be aliens. However, as indicated by the above-mentioned cases and statutes, persons have been held to be aliens who were *not* born out of the United States and conversely, persons have been held to be citizens who were born out of the United States and were not naturalized in the usual sense of that word, "under their constitution and laws." The Court itself recognizes the difficulty of rigid adherence to definition in its reference to the case of *Reynolds v. Haskins*, 8 F. (2d) 473, but stated that, even though such were the case, absent any express declaration of Congressional intent, there was no justification for holding that persons born in the United States of parents who were Japanese citizens and who renounced their citizenship under Section 801 (i) *supra*, became aliens while resident in the United States. We submit that it can be demonstrated that the purpose of Congress in passing 801 (i) *supra*, was to convert, in time of war, certain persons who held dual citizenship and who voluntarily renounced their American citizenship into alien enemies and thus make such renunciants removable under the provisions of the Alien Enemy Act of 1798.

III. The issue of the scope and purpose of section 401 (i) of the Nationality Act of 1940 (8 United States Code, section 801 (i))

The District Court in its Opinion concluded that the only purport of the whole of Title 8, United States Code, Section 801, including the amendment by subsection (i) is to effect termination of American citizenship and that the said Nationality Act of 1940, together with its amendments, in no way fixes or determines any particular alien nationality for the expatriate. While admitting that the Alien Enemy Act of 1798, *supra*, broadly applied to "natives, citizens, denizens, or subjects" of a hostile nation or government, nevertheless, the Court held that "absent any express declaration of Congressional intent, there is no justification for holding that under the Alien Enemy Act, a native-born resident American citizen, who renounces his American citizenship pursuant to Section 801 (i), may be deported, at least, as long as he continues to reside here."¹⁵ If the Court agreed with appellant's concept of dual citizenship, namely that when appellees' United States citizenship ceased to exist their Japanese nationality remained and that, accordingly, they were alien enemies under the provisions of the Alien Enemy Act of 1798, it would in no

¹⁵ This portion of the Court's Opinion is not understood, for it is antithetical to state that a sovereign may not deport a person, "at least, as long as he continues to reside here." This is so for the reason that deportation is the act of removing an alien from a country and it is therefore difficult to understand a rule of deportation which can only be exercised, in effect, subsequent to the departure of a person from the territorial limits of a country. If, as suggested by the Court, such a right exists, it is indeed an empty one.

wise be necessary to examine the scope and intent of Congress in passing Subsection (i). In any event, we do not deem it necessary to generally discuss the whole of Section 801 of Title 8, United States Code, and such comment will be limited to the scope of Subsection (i) and the Congressional intent in its enactment. This latter is necessary because of the Court's reference to the absence of any express declaration of Congressional intent to have persons possessed of dual nationality considered aliens in contemplation of law, upon their renunciation of American citizenship under 801 (i).

At the outset, it may be admitted that there is no express provision in Subsection (i) which states that upon renunciation of United States citizenship, and its approval by the Attorney General as being contrary to the interests of national defense, such renunciant would become an alien of any particular nationality. The legislative history of Subsection (i), however indicates that this was not expressly stated because of Congressional opinion that the same would be unnecessary, particularly in the cases of persons born in the United States of parents who possessed Japanese nationality. The then Attorney General recommended the enactment of Subsection (i) to the Congress, and personally appeared before the Committee on Immigration and Naturalization, House of Representatives. In his testimony before this Committee, discussing the difference between the bill as proposed by him and other proposed bills providing for the loss of United States nationality of persons of Japanese descent, he stated as follows:

A principal difference in the bill proposed by me is that it does not rely upon some Administrative determination concerning what particular conduct indicates loyalty to a foreign sovereign, but expressly provides for a formal written renunciation of United States nationality which would thereupon permit dual nationals, such as most Japanese, to be interned as alien enemies and eventually returned to Japan. (Hearings, House Committee on Immigration and Naturalization, 78th Cong., 2d Sess., on H. R. 4103.)

Examination of these hearings and Congressional debates demonstrates that the understanding of Congress in discussing this subsection was that most persons born in the United States of parents who possessed Japanese citizenship would, upon their renunciation of American citizenship, be subject to internment as alien enemies. Illustrations of such understanding are as follows:

Mr. ENGLE of California. The Attorney General proposes a bill whereby these Japanese could sign a written renunciation of their nationality in the United States, which would put them in a position of being aliens, and thereby the government of the United States in a better position to deal with them now and after the war. There is only one basic difficulty in that bill, and that is that it requires a further and additional act of renunciation of loyalty on the part of these Japanese (90 Cong. Rec. 1786).

Again at page 1787 of Volume 90 of the Congressional Record the following statement is made by Representative Allen of Louisiana:

Your Committee received the benefit of a thorough study of all these Bills by the Department of Justice and did not act on any Bill until the Department of Justice had a chance to give thorough study to the question. As a result of that thorough study by the Committee and as a result of the thorough study of the Department of Justice we have brought out this Bill [H. R. 4103] solely to enable persons to divest themselves of citizenship who say in writing that they do now want to remain citizens of this country, that they wish to give up their citizenship. We want such people to have a chance to become alien enemies. At the present time they are not alien enemies; they are American citizens. We want to convert their status from citizens of the United States to the position of Alien enemies.

In continuing the debate Mr. Allen stated at page 1788 of Volume 90 of the Congressional Record that:

The Justice Department has made an exhaustive study of the law and tells us that there is now no way for disloyal persons to renounce their citizenship and thus become alien enemies. This Bill provides that way. That is all it does.¹⁶

In the debates in the Senate a similar understanding of the purpose and scope of Subsection (i), *supra*, is indicated. Senator Russell in explaining the purposes of H. R. 4103 (subsequently enacted as Section 401 (i) of the Nationality Act of 1940) stated:

¹⁶ The statements of Mr. Allen in open debate in the House of Representatives is deserving of weight, since he was a member of the Committee on Immigration and Naturalization which conducted the hearings on H. R. 4103.

In this country there are many persons of the Japanese race who really possess a dual citizenship. They were born in this country and have American citizenship. Many of them have been back in Japan and they really feel that their allegiance is to the Emperor of Japan. We are now detaining these people in relocation centers. Under the Bill if they apply voluntarily, to divest themselves of their American citizenship, they will be taken out of our relocation centers and interned as enemy aliens (90 Cong. Rec. 6617).¹⁷

It is submitted that from the foregoing debates and hearings there can be no question but that Congress intended, in enacting Section 401 (i) *supra*, that persons, in general, possessing dual citizenship and, in particular, persons born in the United States of parents possessing Japanese citizenship, who renounce their citizenship pursuant to said Subsection (i) would become alien enemies as a result of their possession of dual citizenship.¹⁸

While, as before stated, Section 401 (i) does not expressly fix or determine any particular alien nationality for the expatriate, there can be no doubt that a reasonable interpretation of that statute with respect to persons possessing dual citizenship, such as appellees possessed at the time of their renunciation, lead to the conclusion that upon renunciation they became alien enemies by virtue of their posses-

¹⁷ See also H. Rept. No. 1075 and S. Rept. 1029 to accompany H. R. 4103, 78th Cong., 2d Sess.

¹⁸ The conclusions of the District Court seem to imply that appellees, at most, became stateless. It is clear that no such intention was possessed by Congress in enacting 401 (i), *supra*.

sion of Japanese citizenship. A resort to the legislative history clearly indicates that such a result was intended. The Supreme Court in *United States v. American Trucking Association*, 310 U. S. 534, states (p. 542) :

In interpretation of statutes the function of the Court is essentially stated thus to construe the language so as to give effect to the intent of Congress. There is no unvarying rule for the discovery of that intention.

Again at page 543 the Court stated:

There is, of course, no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has lead to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act * * *. Frequently, however, even when the plain language did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, this Court followed that purpose rather than the literal words * * *.”¹⁹

¹⁹ To the same effect see *Levinz v. Will*, 1 Dall. 430-433; *Respublica v. Betsey*, 1 Dall. 468, 477; *Ozawa v. United States*, 260 U. S. 178, 194; *Puerto Rico v. Shell Co.*, 302 U. S. 253, 258; *United States v. Dickerson*, 310 U. S. 554, 561-562; *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479; *Hirabayashi v. United States*, 320 U. S. 81; *Carolene Products Co. v. United States*, 323 U. S. 18, 28; *Vermilya-Brown Co. v. Connell*, 335 U. S. 377, 385.

We submit that in view of the legislative history of Subsection (i) the clear intent of Congress was that such persons as appellees, upon renouncing their American Citizenship pursuant to its terms, became citizens and subjects of Japan and, consequently, that they are alien enemies within the provisions of the Alien Enemy Act of 1798 and while in the United States, were subject to being detained and removed, pursuant to the terms of that Act. To hold otherwise, because the same was not expressly declared, would be to "fly in the teeth" of all manifest Congressional intent.

Compare the much quoted statement of Justice Holmes in *Johnson v. United States*, 163 Fed. 30, 32, where he stated: "It is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it and, therefore, we shall go on as before."

CONCLUSION

For the foregoing reasons it is respectfully submitted that appellees, possessed simultaneously United States citizenship and Japanese citizenship and that upon their renunciation of American citizenship, while resident in the United States they, because of their possession of Japanese citizenship, became alien enemies and, consequently, were liable to detention and removal pursuant to the provisions of the Alien Enemy Act of 1798. In view of this, the Order of the District Court granting a Writ of Habeas Corpus and the Orders denying appellant's Motions for Summary Judgment, to Strike and Dis-

miss the Amended Petition and granting appellees Motions for a Summary Judgment and for Judgment on the Pleading, should be reversed.

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Assistant Attorney General.

FRANK J. HENNESSY,
United States Attorney.

ROBERT B. McMILLAN,
Assistant United States Attorney.

ENOCH E. ELLISON,
Special Assistant to the Attorney General.

PAUL J. GRUMBLY,
Attorney, Department of Justice.

APPENDIX A

Title 50, U. S. C., section 21, reads as follows:

§ 21. *Restraint, regulation, and removal.* Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety. (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531.)

Section 403 (a) of the Nationality Act of 1940, as amended, as it appears in title 8, U. S. C., 1946 edition:

§ 803. *Restrictions on expatriation; residence in United States; age.* (a) Except as provided

in subsections (g), (h), and (i) of section 801 of this title, no national can expatriate himself, or be expatriated, under this section while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and when the national thereafter takes up a residence abroad.

APPENDIX B

STATUTORY RULES AND ORDERS—1943

Vol. I. (pp. 67-68)

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914

DECLARATION OF ALIENAGE

I, A. B., of

...

being a person who, by reason of my having been born within His Majesty's dominions and allegiance [on board a British ship], am a natural-born British Subject, but who at my birth [during my minority] became under the law of a subject also of that State, and am still such a subject, and of full age and under disability,

...

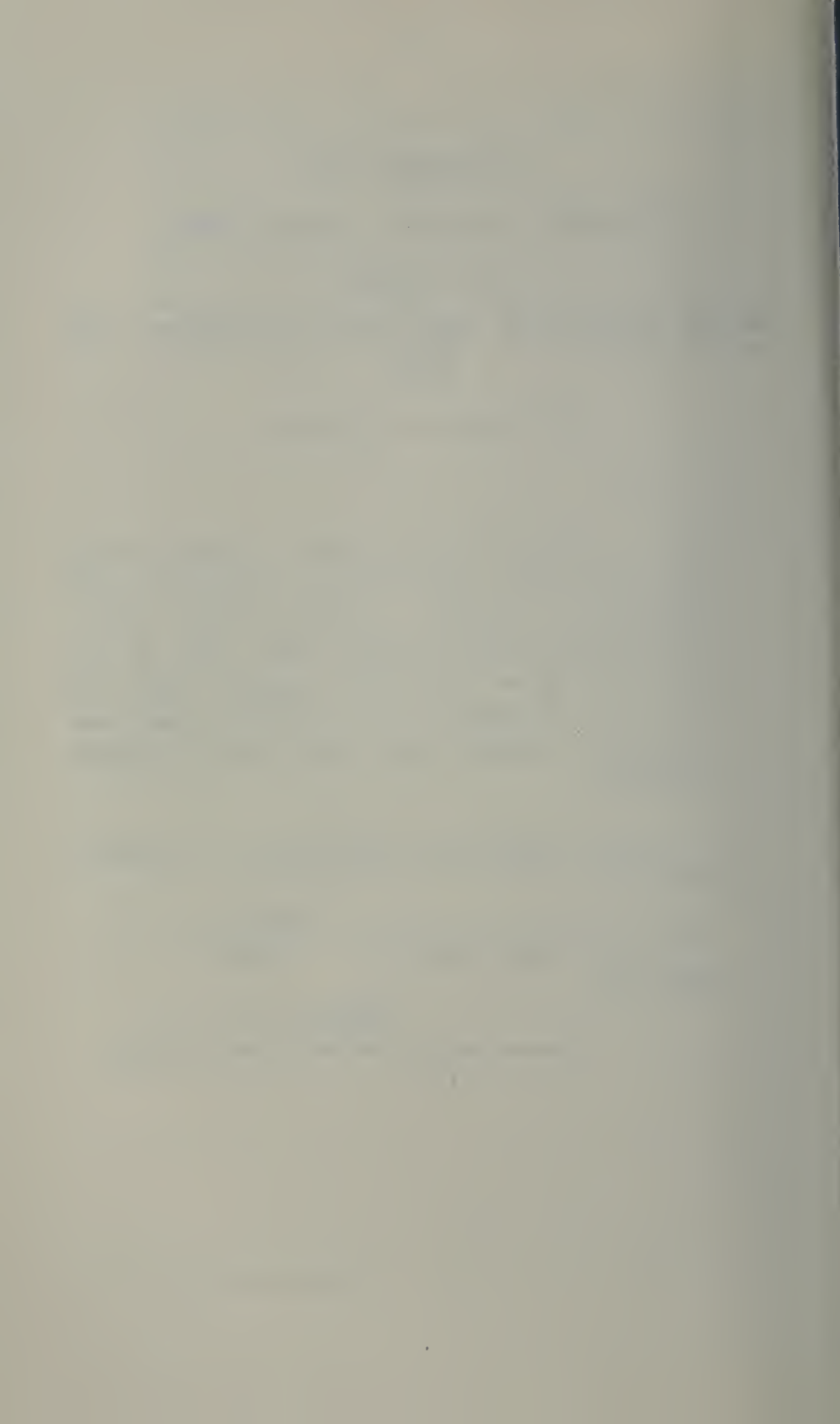
do hereby renounce my nationality as a British subject.

(Signed) A. B.

Made and subscribed this day of
before me,

(Signed) X. Y.,

[Justice of the Peace Commissioner, or other official title.]



Nos. 12,195 and 12,196

IN THE

United States Court of Appeals
For the Ninth Circuit

BRUCE G. BARBER, as the District Director
of the U. S. Immigration and Naturali-
zation Service for the Northern District
of California,

Appellant,
(Respondent Below)

No. 12,195

vs.

TADAYASU ABO, et al., etc.,

Appellees,
(Petitioners Below)

and

BRUCE G. BARBER, as the District Director
of the U. S. Immigration and Naturali-
zation Service for the Northern District
of California,

Appellant,
(Respondent Below)

No. 12,196

vs.

MARY KANAME FURUYA, et al., etc.,

Appellees.
(Petitioners Below)

BRIEF FOR APPELLEES.

On Appeals from Final Decisions of the District Court of the
United States for the Northern District of California,
Southern Division, in Habeas Corpus Proceedings.

WAYNE M. COLLINS,

Mills Tower, San Francisco 4, California

Attorney for Appellees.

PAUL P. O'BRIEN, -

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Nos. 12,195 and 12,196

IN THE
United States Court of Appeals
For the Ninth Circuit

BRUCE G. BARBER, as the District Director
of the U. S. Immigration and Naturali-
zation Service for the Northern District
of California,

Appellant,
(Respondent Below)

vs.

TADAYASU ABO, et al., etc.,

Appellees,
(Petitioners Below)

and

BRUCE G. BARBER, as the District Director
of the U. S. Immigration and Naturali-
zation Service for the Northern District
of California,

Appellant,
(Respondent Below).

vs.

MARY KANAME FURUYA, et al., etc.,

Appellees.
(Petitioners Below)

No. 12,195

No. 12,196

BRIEF FOR APPELLEES.

On Appeals from Final Decisions of the District Court of the
United States for the Northern District of California,
Southern Division, in Habeas Corpus Proceedings.

**STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING BASES OF COURTS' JURISDICTION.**

These are appeals by Bruce G. Barber, in his representative capacity as the District Director of the U. S. I. & N. S. for the Northern District of California from final decisions of the district court below entered on August 11, 1947, awarding the appellees writs of habeas corpus (R. 194) in representative class proceedings brought under Rules 20, 23(1-3), 18a, b, 19a, b, and 81(a) (2), R.C.P., and ordering them discharged from the custody of the appellant. R. 191-195. The causes were decided on motions for summary judgment and on the pleadings, as authorized by the rule laid down in *Walker v. Johnston*, 312 U.S. 275, 284, and by Rules 12(c) and 56(a) R.C.P.

The district court below had jurisdiction of the proceedings below under the provisions of 28 USCA, Secs. 451-452, now Sec. 2241, and this Court has jurisdiction to review those decisions below by virtue of the provisions of 28 USCA, Sec. 463(a), now Sec. 2253, and Sec. 225(a) (first), now Sec. 1294.

The memorandum Opinion of the court below (R. 175-180 and amplification thereof at R. 182-185), is reported in 76 Fed. Supp. 664, and the Opinion of that Court dated April 29, 1948, amplifying its grounds of decision appears at R. 410-427 in the record on appeal in the companion appeals in equity cases Nos. 12251-2 and is reported in 77 Fed. Supp. 806.

The pleadings necessary to show the existence of the jurisdictions are the amended petition for the writ (R. 99); amended return (R. 134); traverse (R. 149); motion for summary judgment (R. 154); cross-motion (R.

161); motion for judgment on pleadings (R. 156); order awarding writ (R. 191) and writ (R. 194).

QUESTION INVOLVED.

Are resident native-born citizens of the United States presently subject to detention and removal to Japan under the Alien Enemy Act as though they were hostile alien enemies simply because while held under duress by the Government in a concentration camp they executed renunciations of U. S. nationality under 8 USCA, Sec. 801(i) during an illegal internment to which they then had been subjected for three years following their original false and unlawful arrest by the U. S. Government for no reason except that they were of Japanese lineage?

OUTLINE OF EVENTS GIVING RISE TO QUESTIONS PRESENTED AND STATUTES AND PROCLAMATIONS, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED.

In 1798 the Alien Enemy Act was enacted by Congress. As amended and codified in Title 50 USCA, Sec. 21 et seq., it provides, in substance, as follows:

“Whenever there is a declared war between the United States and any foreign nation or government, * * * and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies * * *”

On December 7, 1941, under the authority conferred upon him by the Alien Enemy Act, President Roosevelt promulgated Executive Proclamation No. 2525 (6 F.R. 6321) which enjoined "all natives, citizens, denizens, or subjects of the Empire of Japan" within our jurisdiction of the age of 14 years and upward "to preserve the peace" and "to refrain from crimes against the public safety". It also admonished them that—

"All alien enemies shall be liable to restraint or to give security, or to remove and depart from the United States in the manner prescribed by Sections 23 and 24 of Title 50 of the United States Code, and as prescribed in the regulations duly promulgated by the President."

On January 14, 1942, he promulgated Executive Proclamation No. 2537 requiring all alien enemies (Japanese, German and Italian) "To apply for and acquire certificates of identification".

Thereafter, between March 30, 1942, and October 27, 1942, all Japanese nationals and American citizens of Japanese ancestry were evacuated from the coastal areas through the medium of 108 civilian exclusion orders, issued by General J. L. DeWitt. (See 7 F.R. 2581 and 6703 for first and last of these orders.) All the affected persons were imprisoned either in concentration camps called War Relocation Centers or in restrictive zones in military areas Nos. 2 to 6, inclusive, for no reason whatever except that they were of Japanese lineage. On August 13, 1942, the Secretary of War issued Public Proclamation WD-1 (7 F.R. 6593) under which the war relocation centers outside General DeWitt's military department were desig-

nated military areas and the departure of interned citizens and aliens of Japanese ancestry was forbidden. This proclamation demonstrated that the evacuation program in reality was nothing but an imprisoning program from its inception.

Title 8 USCA, Sec. 801(i), was enacted as a wartime statute by the Act of July 1, 1944 (58 Stat. 677), amending Sec. 401(i) of the Nationality Act, for the special purpose of obtaining renunciations of citizens of Japanese lineage detained in our concentration camps. It was rendered inoperative by the Joint Resolution of Congress of July 25, 1947, 61 Stat. 454. It reads as follows:

“A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(i) Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense;”

Thereafter, on October 6, 1944, Francis Biddle, as the then Attorney General, set up Secs. 316.1 to 316.9, inc., of Title 8 of *his Nationality Regulations*, under authority of Title 8 USCA, Sec. 801(i), providing the procedure for renunciation of nationality thereunder.

On December 17, 1944, General Pratt promulgated Public Proclamation No. 21 (10 F.R. 53) cancelling the 108 mass civilian exclusion orders which previously had been issued by General DeWitt. (See also Pub. Proc. WD-2 of

January 2, 1945; 10 F.R. 889.) This permitted all previously excluded persons of Japanese extraction to return to the prohibited areas save those, if any, against whom individual exclusion orders thereafter might issue. On September 4, 1945, he promulgated Public Proclamation No. 24¹ (10 F.R. 11760) which was a blanket rescission of all individual civilian exclusion orders then outstanding.

The two military proclamations are executive judgments, based upon official military findings, that not one of the persons of Japanese ancestry who had been excluded from the Western States constituted a threat to our security. In view of these executive findings made by the War Department and by General Pratt who then was in charge of the Western Defense Command it ill became the Attorney General thereafter to assert any of the appellees presented a threat to our security.

On July 14, 1945, under authority of the Alien Enemy Act, President Truman promulgated Proclamation No. 2655 (10 F.R. 8947) providing, in part, as follows:

“All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have ad-

¹The Proclamation reads, in part, as follows:

“(a) All Individual Exclusion Orders heretofore issued by the Commanding General, Western Defense Command, and now in effect are rescinded;

(b) The effect of the rescission in paragraph (a) hereof is to remove all restrictions heretofore imposed by or because of Individual Exclusion Orders issued by the Commanding General, Western Defense Command. All persons permitted to return to the West Coast areas by rescission of Individual Exclusion Orders shall be accorded the same treatment and allowed to enjoy the same privileges accorded law abiding American citizens or residents.”

hered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.”

This proclamation referred to the alien enemies mentioned in Public Proclamations 2525, 2526 and 2527 (6 F.R. 6321, 6323 and 6324) of December 7 and 8, 1941; No. 2523 of December 29, 1941; No. 2537 of January 14, 1942 and No. 2563 of July 17, 1942, the alien enemies being foreign born nationals of Japan, Germany, Italy, Bulgaria, Hungary and Roumania. It did not apply to alien enemies who were friendly to us. It could never have had any application to citizens or to our native-born who might become and could become only mere “non-citizen” residents or “stateless” persons by a renunciation of citizenship privileges if renunciation constitutionally could have been effectuated.

On August 10, 1945, the Japanese Government sued for peace and surrendered on the general terms announced by the Allied Powers at the Potsdam Conference. On August 14, 1945, President Truman publicly announced Japan had made a full acceptance of the Potsdam Declaration, specifying that Japan surrendered unconditionally, that hostilities had been ordered suspended and that he would make a proclamation of V-J Day upon the formal signing of the surrender. Thereafter, the President officially proclaimed September 2, 1945, to be V-J Day. General MacArthur and his troops have not encountered opposition from the Japanese since their surrender and our occupation of Japan. That vanquished nation has complied with

the terms imposed upon it by the victors and has cooperated with the policies laid down by General MacArthur.

During their detention by the Government at the Tule Lake Center 5,371 American born citizens of Japanese ancestry of the age of eighteen (18) years and upward, in early 1945, signed applications for renunciations of U. S. nationality. In eight (8) other like concentration camps a total of only 151 similarly situated and mistreated citizens signed like applications.²

Attention is drawn to the fact that when renunciation applications were signed at the Tule Lake Center the petitioners were faced with extraordinary conditions. They had been imprisoned for over three years without charges of any kind having been lodged against them. They had not been given any hearings of any kind whatsoever preserving the rudiments of due process of law. They had no expectancy of any immediate relief or of any release from their incarceration. Their imprisonment was not only of indefinite duration but it appeared that it might be perpetual. It was arbitrary, unreasonable and capricious. The communities from which they had been ruthlessly evacuated were hostile to their return. They feared they never would be restored to civilian life in this country but would be deported to Japan. They feared removal from the Tule Lake Center because of outside hostility to persons of Japanese ancestry. They were held in duress by the government although they were guiltless of wrongdoing. They were subjected to the intense pressure of the alien terrorists the government permitted to operate

²These are as follows: Central Utah, 9; Colorado River, 86; Gila River, 26; Granada, 12; Heart Mountain, 1; Manzanar, 8; Minidoka, 7; Rohwer, 2.

in that Center and against whom it gave them no protection whatever. Terror reigned against them from outside that Center and terror reigned against them inside that Center.

The United States Government owed these citizens the maximum amount of protection a government can give its citizens but it gave them no protection whatever. Having subjected them to a course of abusive treatment never visited upon any other group of citizens in our history it proceeded to abandon them utterly. While they were held in a grip of doubt, uncertainty, fear and terror it added the crowning insult to the injuries it already had inflicted upon them. The Department of Justice procured from Congress the passage of the renunciation statute, a special species of class legislation designed specifically for application to our citizens of Japanese ancestry. R. 160. It sent its agents post-haste to the Center to invite renunciations from the helpless internees. It solicited their renunciations while they were herded behind barbed wire fences and while armed guards patrolled the perimeter of the Center and loaded guns frowned upon the internees. It accepted renunciations from tormented persons engulfed in a mire of mass hysteria induced by the Government. It accepted renunciations from children and from persons who had been driven insane by the internment and the terror that ruled the camp.³ It in-

³A total of 5,522 renunciations were obtained from Americans of Japanese ancestry. Children who were 14 and 15 years of age when first imprisoned and whose renunciations were approved when they were 18 are now adults. The Attorney General, aware of the injustice of their imprisonment, nevertheless approved their renunciations with full knowledge of their minority and of the duress in which they had been held for years.

vited the interned aliens to apply for repatriation to Japan and the citizens to apply upon a "repatriation" form for transportation to Japan.

At the time of the renunciations the Department of Justice did not contemplate involuntary removal. It led the internees to believe that only those who requested leave would be permitted to go to Japan. The Department then did not contemplate that any Japanese descended person would be expelled from this country and be deported to Japan against his will. Its acceptance of requests for transportation to Japan was kept upon a voluntary basis.

The relocation office in the Center had been closed for months by the W.R.A. and, in consequence, none of the internees were able to apply for relocation in the United States. R. 229, 255, 298 in No. 12251-2. The W.R.A. and not the Department of Justice was responsible for this action. The Department then did not contemplate indefinite detention and removal of the renunciants to Japan. The renunciants then were held in the custody of the W.R.A. and not of the Attorney General. Even the fact that the renunciants were to be detained was kept secret from them.⁴

⁴In his letter of August 22, 1945, to Ernest Besig, director of the American Civil Liberties Union of Northern California, Edward J. Ennis, director of the Alien Enemy Control Unit of the Department of Justice, explains this secret policy as follows:

"Individual renunciants have not been informed that they are to be detained because the War Relocation Authority, I believe correctly, feared that if it became generally known in War Relocation Authority Centers that every renunciant would be detained that might lead to a fresh wave of renunciations in other Centers by persons who were loyal to the United States but who, because of economic fears, were unwilling to

During the war period the Department of Justice neither intimated nor announced that it intended a forcible removal of any renunciant to Japan. Its removal policy first was decided upon and took shape after V-J Day. Having been trapped and coerced into renouncing while held under duress and caught in the grip of the terror that ruled in the Center and while laboring under fear of the community hostility that menaced them from the outside the renunciants suddenly were informed they were scheduled for removal to Japan.⁵ Thereafter, out of the total number of renunciants, approximately 1,600 were transported to Japan either through fear, despair, resentment of their mistreatment or simply because they were obliged to accompany aged parents who were repatriated to Japan. Approximately 8,000 impoverished, disappointed and disillusioned persons have been transported to Japan, including aliens, their native born children and renunciants. All the alien leaders of the fanatical pressure groups which operated in the Center were removed to Japan as also were the few citizens who became active leaders. R. 169, 254, 266 in No. 12251-2.

leave the Centers and who might renounce their citizenship as a means of insuring their continued detention in a camp. For this reason only such renunciants at Tule Lake as have indicated a desire to leave have been told that they were in detention * * *

⁵The Newell-Star, the official publication of the Tule Lake Center, October 26, 1945, carried a letter of instruction to Mr. Best, Project Director, from Ivan Williams as the Officer in Charge for the Department of Justice notifying all renunciants of impending removal to Japan. The notification reads as follows:

"1. All persons whose applications to renounce citizenship have been approved by the Attorney General of the United States, will be repatriated to Japan, together with members of their families, whether citizens or aliens, who desire to accompany them."

When these proceedings were instituted below the Attorney General was detaining against their desire, as alien enemies for removal to Japan, approximately 5,500 native-born Americans of Japanese ancestry in the Tule Lake Center, California, and in internment camps at Bismarck, N. D., Santa Fe, N. M., and Crystal City, Texas.

The petitions for the writ were filed in the court below on November 13, 1945, on behalf of 987 petitioners then detained at the Tule Lake Center, Newell, Modoc County, California.⁶ Thereafter, pursuant to various stipulations and court orders hundreds of additional petitioners were joined as parties petitioner in said proceedings. (See R. 205-6 and references to the unprinted record for names and dates of joinder.) As a result of the suits the removal proceedings were halted. Thereafter orders to show cause (R. 71) why they should not be removed from their native soil to Japan were issued by the Attorney General and each of them was subjected to an arbitrary administrative examination at which time each was deprived of the assistance of counsel. Before those so-called "mitigation"

⁶In August, 1945, the WRA turned over the police squad room at Tule Lake to counsel for conferences with thousands of his interned clients. The seating facilities were some 36 packing boxes containing live rifle and revolver cartridges, 6 like boxes containing live tear gas bombs and 6 like boxes containing live hand grenades, all plainly labelled with their contents. A dozen rifles were stacked in one corner. After approximately 1,000 persons had been interviewed in groups of 200 counsel became aware of the discomfort of the interviewed and, inquiring, learned of their fears of possible accidental explosion from those sources. At counsel's insistence two Caucasian police were called in to remove the offending boxes and they, along with a number of the internees carted the boxes off to a room in the opposite end of the building. Had an explosion occurred and all of us been blown to kingdom come it doubtlessly would have been reported as an act of sabotage. It is somewhat amusing to reflect that citizens, branded dangerous alien enemies, carried off the munitions to a place of safety.

hearings on such orders to show cause were completed and when approximately 1,800 out of a total of some 4,200 had been held, the Attorney General, on February 12, 1946, published a list containing the names of 449 renunciants in Tule Lake Center who were given unfavorable recommendations following their hearings. Not one name was added to that unfavorable list from those who there later received their hearings. Those who received an unfavorable recommendation were selected arbitrarily from the first group of 1,800 examined. These were detained for detention and ultimate removal to Japan not on the basis of any such hearing but because they were classified either as being "kibei", which is to say nothing more than that they had received a measure of their education in Japan, or because their next of kin resided in Japan. The remaining 2,400 renunciants at Tule Lake were fortunate for they were released unconditionally whether or not they were classified as kibei or as having their next of kin in Japan.⁸ The Attorney General held the 449 for removal to Japan under the provisions of Executive Proclamation No. 2655 which was promulgated under an ostensible authority of the Alien Enemy Act under the nebulous theory that by a simple renunciation of U.S. nationality they had become "alien enemies" within the purview of that Act.

⁸The release was a belated demonstration that they never had constituted a threat to our security. The retention of 449 out of 5,537 at that late date for further detention and final removal to Japan was the result of caprice designed to lend a semblance of justification to the long series of governmental blunders and abusive treatment that caused the renunciations. It was nothing but a government face-saving measure.

Shortly after March 14, 1946, counsel for the parties hereto entered into a "Stipulation" (R. 94-95) under which the petitioners below not then released from custody were transferred from the Tule Lake Center in California to Santa Fe, New Mexico, Crystal City, Texas, and Bridgeton, New Jersey. Thereupon the Tule Lake Center was abandoned and, a short time later, the Santa Fe camp was closed out. Thereafter, prior to the award of the writs below all except 136 petitioners in proceeding No. 12195 and 2 in No. 12196 were granted outright releases from internment by the Attorney General.

On September 6, 1947, by a "Consent" (R. 196-197), the Attorney General released the 138 appellees then detained at Crystal City, Texas, and on "relaxed internment" at Seabrook Farms, Inc., Bridgeton, New Jersey, together with the 154 detained Nisei at said places who were not parties petitioner in the proceedings below, into the custody of their attorney whereupon all of said persons returned to their respective homes in the United States at government expense. Not one of the affected persons then was in the State of California. Thereupon the last of the wartime concentration camps maintained by the Government was closed. It is likely that by reason of the Supreme Court's decision in *Ahrens v. Clark*, 335 U.S. 160, which was decided on June 21, 1948, that this Court must affirm the final decision of the Court below if only for jurisdictional reasons.

It is a matter of public notoriety that none of the appellees either before or since their evacuation have been guilty of any acts presenting a clear and present danger to our government. The fact that the Attorney General

relaxed the internment of these renunciants and later released them to their attorney demonstrates that although he asserted them to be dangerous alien enemies his action demonstrated them to be harmless and proves that they did not menace our security. It is clear that the government, by the evacuation, imprisonment, renunciation and removal program, invaded the liberties of these persons and stripped them of all the rights, privileges and immunities that spring from national citizenship. Their constitutional rights and their rights under the Civil Rights Statutes were flouted, trampled upon and ignored by the Government as though they did not exist. The mistreatment exceeds the bounds of reason and is unprecedented in American history. If it is to be the forerunner of future deprivations of the rights of other minorities it is the harbinger of the decay of constitutional government.

SUMMARY OF ARGUMENT.

We contend that the unconstitutional treatment accorded the appellees during the war and since then has neither a legal nor a moral justification. We deny the validity of the renunciations, deny that the appellees are alien enemies and deny the applicability of the Act and Executive Proclamation to them. We contend that the renunciations are void for being the products of governmental duress and of the incidental private duress for which it was responsible; that the renunciation statute is special discriminatory class legislation and is invalid and unconstitutional on its face and as applied to them; that the Alien Enemy Act never has had application to them and that it is not

a self-perpetuating statute but, on the contrary, automatically ceased to apply even to alien enemies within a reasonable period of time after the cessation of hostilities with Japan.

In the following pages we do not address ourselves to the invalidity of the renunciations as the result of duress but reserve this question for discussion in our brief on appeal in the consolidated suits in equity brought to rescind the renunciations. Herein we shall limit ourselves to an attack upon the application and constitutionality of the renunciation statute, the validity of the nationality regulations and the detention and threatened removal of the appellees upon the ground that even if the renunciations were to be deemed valid the appellees do not fall within the category of "alien enemies" as defined in the Alien Enemy Act and that, in consequence, Executive Proclamation No. 2655 cannot be applied to them. Consequently, we maintain that the appellees were unlawfully detained and are not subject to removal to Japan.

The pleadings admit that each of the appellees is of Japanese ancestry. The admission of par. II of the answer to the amended petition (R. 134) that each is a "person of Japanese ancestry, a native, domiciliary of the United States, and a resident of the Northern District of California" and the admission in par. III thereof (R. 135) that each was detained by respondent for removal purposes, aside from any evidentiary proof, are sufficient to reveal that the Alien Enemy Act has no application to them and that their detention was absolutely unlawful as a matter of law as also is their threatened removal to Japan.

ARGUMENT.

I.

THE RENUNCIATION STATUTE IS VOID FOR DENYING EQUALITY AS AN ELEMENT OF THE DUE PROCESS GUARANTY OF THE 5TH AMENDMENT.

The legislative history of the renunciation statute, 8 USCA, Sec. 801(i), shows that it was enacted for the express purpose of procuring the renunciations of Nisei held in our concentration camps. (R. 155-161.) It was intended to apply to them and was applied to them to the exclusion of other types of citizens. Inasmuch as it was an unjust discrimination against them, "applied and administered by public authority with an evil eye and an unequal hand" it is void as a denial of the equal protection of the law which is implicit in the due process guaranty of the 5th Amendment. See *Yick Wo v. Hopkins*, 118 U.S. 356; *Ah Sin v. Whitman*, 198 U.S. 500, 507-8; and *Sims v. Rives* (CCA-DC), 84 Fed. 2d 871, cert. den. 298 U.S. 682.

II.

A RESIDENT NATIVE BORN RENUNCIANT IS NEITHER DETAINABLE NOR REMOVABLE UNDER THE ALIEN ENEMY ACT.

Renunciation.

From the standpoint of statutory construction, without touching upon the constitutionality of the matter, a renunciation of U.S. nationality is neither a criminal nor a tortious act. It has not been made illegal or punishable by Congress. On the contrary, it has been specifically designated a lawful act by Congress in Title 8 USCA,

Sec. 801 (i).⁹ Neither that section nor any statute authorizes the expulsion, banishment or removal from the United States of a person who renounces. By renunciation under this statute, provided it be constitutional which we deny, a native born renunciant merely would relinquish his national status of citizenship. His political status would change from that of a "citizen" to that of a "non-citizen". Although he thereby would become detached from the government he would remain attached to this country, his native soil, and thereafter hold a status similar to that formerly held by American Indians, the aborigines of this land who, until recently, were considered non-citizen residents of this country but subject to our jurisdiction. He would not become an alien for an alien is defined to be a person born outside the United States who has not become a naturalized citizen. *Low Wah Suey v. Backus*, 225 U.S. 460, 473.

The losses a resident renunciant would suffer, if renunciation were constitutional, would be those which result from the loss of nationality status, i.e., he would surrender only the political privileges that are peculiar to citizenship. He would yield his right to hold public office and his right to vote. He would waive his right to participate in the government of the nation but remain subject to its jurisdiction. Despite the fact that he would divest himself of citizenship rights the government still would extend certain rights to him. He would be protected in

⁹This statute is the first congressional expression in our history which attempts to authorize the renunciation of nationality by a resident citizen. Prior to its enactment expatriation and also renunciation abroad were recognized legal rights but renunciation of a resident citizen was not authorized.

the exercise of those "inalienable" civil rights which the Constitution guarantees him as a "person" under the 5th and 14th Amendments. If resident aliens have constitutional rights which even Congress may not ignore in its plenary power of deportation as declared in *Truax v. Raich*, 239 U.S. 33, *Bridges v. California*, 314 U.S. 252, and in the concurring opinion of *Bridges v. Wixon*, 326 U.S. 135, 161, it follows that the similar rights guaranteed to resident native-born subjects or non-citizens cannot be ignored. It long has been settled that the existence of a state of war does not suspend the provisions of the 5th Amendment. *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81.

A simple renunciation of nationality by a native-born resident which was not followed by expatriation could not transform him into a foreigner, an alien or a stranger. It could not clothe him with a foreign nationality or deliver him into the jurisdiction of a foreign power. He would remain a native of this country in which he has his residence and domicile. If renunciation were constitutional he would become "stateless" but would remain a subject of our government. Although he would forfeit his political privileges he still would be an inhabitant of this country and so long as he resided within our boundaries he would be subject to the jurisdiction of our government. He could not acquire foreign allegiance or citizenship so long as he remained within our geographical limits. No foreign power could claim his allegiance or acquire jurisdiction over him while he remained on his native soil.

A simple renunciation, if constitutional, would deprive a person of his substantive right of national citizenship

and of the adjective right to assert it in our forums but it is doubtful that it would deprive him of state citizenship. We maintain, however, that national citizenship is a substantive status which, once gained, persists and cannot be lost in the absence of constitutional authorization prescribing grounds for forfeiture although the adjective right to assert it may be waived under certain conditions hereinafter discussed.

Expatriation.

A citizen by birth or by naturalization can relinquish his nationality only by one or more of the methods prescribed by Congress in Title 8 USCA, sec. 801. No other methods have been set up for (1) relinquishment of U.S. nationality or (2) for expatriation.

By abandoning his U.S. residence and domicile, voluntarily departing from this country and acquiring a foreign residence and domicile and then becoming naturalized in a foreign country he becomes an *expatriate* and occupies the status of an alien. By expatriation he surrenders his right to return to this country except on the same basis as an alien complying with our immigration laws. *Reynolds v. Haskins* (CCA-8), 8 Fed. 2d 473; *McC Campbell v. McC Campbell* (DC-Ky.), 13 Fed Supp. 847; 11 *C.J.* 784 and note 14. Consequently, any American who leaves our geographical jurisdiction and becomes an expatriate is barred from returning here except by complying with our immigration laws. See 14 *C.J.S.* 1149, sec. 17 and cases there cited. If such a person did not become naturalized in the foreign state he would be a "stateless" person there.

Foreign residence in and of itself does not convert a person into a citizen of another country. Naturalization in the foreign state first must be authorized by that state and be acquired by the applicant. See *Savorgnan v. U.S.*, 94 L. Ed. Adv. Ops. 203; *Elk v. Wilkin*, 112 U.S. 94. In time of peace the consent of our own government is not necessary for one of our citizens to expatriate himself but the consent of the foreign sovereign is necessary for him to acquire its nationality. *Jennes v. Landes* (CC-Wash.), 84 Fed. 73. Foreign nationality is acquirable only by a formal naturalization in a foreign state (8 USCA, sec. 801 (a)) after U.S. nationality first has been surrendered in the foreign state to a U.S. diplomatic or consular officer pursuant to the provisions of Title 8 USCA, sec. 801 (f). Such a foreign naturalization must be based upon the mutual consent of the applicant and the foreign government. If he did not become naturalized formally in a foreign state but that state, nevertheless, tolerated his presence within its territory such a person would be deemed to be a "stateless" person by its and our law. Whether or not he became a "stateless" person or actually an expatriate by naturalization in a foreign state he could resume U.S. citizenship by compliance with the provisions of our naturalization laws as hereinafter explained.

The right of expatriation is inherent if the method pursued is one of those prescribed by the expatriation statute. *U.S. ex rel. Scimeca v. Husband* (CCA-2), 6 Fed. 2d 957. It is to be observed that expatriation must be *voluntary* to operate as a bar to an assertion of U.S. citizenship. Even involuntary service in the military

forces of a foreign power does not deprive a person of his right to assert his citizenship. See *Ishikawa v. Acheson* (DC Hawaii, Aug. 12, 1949), 85 Fed. Supp. 1; *U.S. ex rel. Francassi v. Karnuth* (DC) (NY), 19 Fed. Supp. 581; *Fish v. Stoughton* (NY), 2 Johns Cas. 407; *Browne v. Dexter*, 66 Cal. 39; and rules, 14 C.J.S. 1144, sec. 15. However, voluntary service in the armed forces of a foreign power following an acquisition of its nationality is an act of expatriation under the provisions of Title 8 USCA, sec. 801. None of the appellees herein has lost his nationality through any of the means therein set forth unless it be through the renunciation sought to be authorized by sec. 801 (i) therein.

The right to assert national citizenship, however, may be barred by voluntary departure from this country, the acquisition of a *foreign residence and domicile* and also when these steps are followed by *naturalization* in a foreign country. Such a combination of successive steps is called "expatriation" by which a person becomes a "stateless" person or a "foreigner" or an "alien". (See 8 USCA, sec. 803a.) By simple *renunciation*, however, a resident native-born citizen does not become an alien but a *stateless* person. The right of a person to remain stateless at his own election is recognized. See *U.S. ex rel. Schwarzkopf v. Uhl* (CCA-2), 137 Fed. 2d 898, 902.

An expatriate abandons whereas a resident renunciant retains his United States residence and domicile.

For expatriation to be effective and to deprive one of the right of residence and domicile in this country it must be made *voluntarily* (*Hardy v. DeLeon*, 6 Tex. 211, at

pp. 106, 117-119; *State ex rel. Phelps v. Jackson* (1907), 79 Vt. 504, 65 A. 657, 8 LRANS 1245), by a person of the *full age* of twenty-one (21) years and not laboring under any legal disability (*McCampbell v. McCampbell* (DC-Ky. 1936), 13 Fed. Supp. 847; *State v. Jackson*, *supra*; *U.S. ex rel. Rojak v. Marshall* (DC-Pa.), 1929, 34 Fed. 2d 219, 220; 11 C.J. 784, note 14), as the result of a fixed determination to change his domicile, followed by a voluntary departure from this country (*Rojak case*, *supra*), and the acquisition of a foreign citizenship and allegiance. See also, 14 C.J.S. 1143, sec. 15, for summary and citations. In 11 C.J. 784 the rule is stated as follows:

“In order that expatriation may be considered to have taken place there must be an actual removal from the country of which the individual is then a citizen or subject, made voluntarily by a person of full age, and under no disability as the result of a fixed determination to change his domicile, as well as to throw off the former allegiance and become a citizen or subject of a foreign power.”

Attention is drawn to the fact that *simple expatriation* is based upon an actual abandonment of U.S. residence and domicile and the acquisition of a foreign residence and domicile while *full expatriation* contemplates the additional factor of a formal naturalization in the foreign state by which a person voluntarily gives that foreign state his complete and undivided allegiance. Mere *renunciation* of nationality within the U.S. does not disturb one's U.S. residence and domicile. Consequently, a resident citizen cannot become an expatriate by simple renunciation. Obviously, infants and insane persons whose re-

nunciations were accepted by the Attorney General were not *sui juris* and, consequently, could not become expatriates or renunciants. See *McCampbell v. McCampbell* (DC-Ky. 1936), 13 Fed. Supp. 847; also *Perkins v. Elg*, 307 U.S. 325, and *Haaland v. Attorney General* (DC-Md.), 42 Fed. Supp. 13.

A simple renunciation of nationality does not justify removal under the Alien Enemy Act.

Simple renunciation does not justify the application of the Alien Enemy Act to a native-born resident. The Act justifies the detention and removal of "alien enemies" and of no other persons whomsoever. It authorizes a presidential restraint only upon "natives, citizens, denizens or subjects of the hostile nation or government". 50 USCA, sec. 21. The word "natives" refers to the place of one's nativity. *U.S. ex rel. D'Esquiva v. Uhl* (CCA-NY 1943), 137 Fed. 2d 903. Nativity, under sec. 20, is determined solely by the place of birth. *U.S. ex rel. Umecker v. McCoy* (DC-ND, 1944), 54 Fed. Supp. 679, appeal dism. 144 Fed. 2d 354. The word "denizens" refers to foreigners in our country who have become naturalized citizens of another country. See *U.S. ex rel. Zdunic v. Uhl* (CCA-NY, 1943), 137 Fed. 2d 858. It refers to foreigners temporarily in our midst who were born in one foreign country but are domiciled in another where they obtained *ex donatione regis* letters patent making them subjects of that country. See 1 *Cooley's Blackstone*, p. 317, sec. 375. In short, citizenship conferred by a parliament or other legislative body is termed naturalization while that conferred by the crown or executive body is

termed denization. The word "subjects" is generic for all types of foreigners in our midst who are domiciled in a foreign country whether they are native citizens, denizens or aborigines of that foreign country or of territory subject to its temporal jurisdiction although its authority is not enforceable when they are outside its boundaries.

If a resident renunciant were to be deported to Japan under protest and under duress it would not be in the capacity of a native, citizen, denizen, or subject of Japan but as an involuntary deportee who is a native, subject and domiciliary of the United States. In Japan he would be accepted only because Japan as a conquered country couldn't refuse him admission but the deportee there would be viewed as a stateless person or as an outcast.

III.

DUAL CITIZENSHIP IS A MYTH.

It is impossible for a resident American citizen to have "dual citizenship", that is, American citizenship while at the same time holding foreign citizenship. In Title 8 USCA, sec. 800 (formerly Title 8 USCA, sec. 15) Congress has expressly *disavowed* the claims of foreign governments to the allegiance of emigrants to this country who have expatriated themselves from foreign lands and has expressly *disavowed* the claims of foreign governments to the allegiance of the native-born descendants of emigrants to our shores, in the following language:

“* * * and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; Therefore any declaration, instruction, opinion, * * * which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.”

By this congressional disavowal any claims foreign governments might make to the allegiance of our citizens are repudiated as being “*inconsistent with the fundamental principles of the Republic*”. As a matter of law, therefore, no resident American citizen has and none can owe any allegiance to any foreign power and none holds and none can hold foreign citizenship or the fictitious political status of a dual citizen. A dual political status is contrary to sovereignty itself and hence unconstitutional. Having a single nationality a resident citizen could relinquish that nationality by renunciation executed under Title 8 USCA, sec. 801 (i), if such were constitutional, without acquiring another nationality. Thereafter, he could expatriate himself but only in *peacetime* and then only by departing voluntarily from this country and taking up “a residence abroad” (Title 8 USCA, sec. 803a) where he would become a “stateless” expatriate unless he became naturalized in the foreign state.

The congressional rejection of the claims of foreign governments to the allegiance of and jurisdiction over our citizens contained in Title 8 USCA, sec. 800, is a legislative declaration of constitutional policy and an announcement of an unalterable inherent principle of sovereignty. Neither by constitutional declaration, treaty nor statute has the United States at any time authorized, conceded or recognized any extraterritorial claim or right of Japan or any foreign power over any of our resident citizens or over any alien residing in the United States. On the contrary, Sec. 800 is an express repudiation of any such extraterritoriality. It is a denial absolute of the fictitious status of dual citizenship. The sole jurisdiction that Japan could have exercised over any person on American soil necessarily would have been restricted to her own authorized diplomatic and consular officers and agents pursuant to treaty provisions or international comity. The exception of those officers, pursuant to international law, proves that her jurisdiction could not extend over any other persons whomsoever. Her extraterritorial jurisdiction would reach such officers but could neither encompass nor affect alien Japanese residing here and could not, in any wise, affect U.S. citizens here regardless of Japanese law. The dual citizenship charge on which the appellant appears to rely has not even the prestige of a legal fiction. It is a legally impossible status. It is absurd for the appellant to resort to such a fictitious theory in a vain attempt to justify the outrages already committed against the appellees by the Administration which for eight long and weary years has acted oppressively against them in the name of the Government.

No issue of dual citizenship is involved.

Paragraph II of the amended petition for the writ of habeas corpus (R. 99) alleges each petitioner to be a native-born resident and domiciliary of the United States. Par. II of the answer thereto (R. 134) admits those allegations, viz., that each is a "person of Japanese ancestry, a native, domiciliary of the United States" and par. II thereof also alleges that each, by renunciation, is an "alien and a citizen and subject of Japan". This latter contention of the appellant is based upon the theory that a few of the petitioners below might have possessed dual nationality at the time of their renunciations according to Japanese law and that on the claimed loss of U.S. nationality they automatically became citizens of Japan although they were physically in the United States. Suffice to state that no evidence of any character whatever was adduced by the appellant to support any such contention.¹⁰

¹⁰In an affidavit of Thomas M. Cooley, II (then one of the attorneys for the respondent below), dated November 7, 1946, and filed November 12, 1946 (as an appendix to respondent's points and authorities (not printed)), and in his affidavit dated January 9, 1947, included in his supplemental brief filed therein on January 27, 1947, and in the letter from GHQ dated 25 November, 1946, attached to his affidavit dated January 6, 1947, included in that supplemental brief, reference was made to what purported to be nothing except hearsay opinions concerning Japanese nationality laws. Those references clearly were inadmissible as evidence for the various reasons specified in the objections and exceptions thereto and motions to strike and suppress the same (R. 164, 170) filed by petitioners below on December 18, 1946, and January 29, 1947, which, along with the causes were submitted to the court below for decision on the motions for summary judgment and on the pleadings by the mutual consent of the parties so as to secure a final disposition of the habeas corpus proceedings without resorting to thousands of individual hearings. Suffice to state that no evidence whatever of the application of any foreign law to any of the appellees was offered by the respondent below.

There is not an iota of evidence in the record submitted to the court below that any of the appellees at any time whatever possessed dual citizenship. The only reference made to any such matter is that contained in the affidavit of Mr. Burling (R. 159 in No. 12251) stating that it was a *belief* in the Department of Justice that Japanese law provided that a citizen born in the United States of Japanese parents prior to December 1, 1924, automatically acquired and held Japanese citizenship unless he affirmatively divested himself of it and that a citizen of such parentage born since said time *might acquire* Japanese citizenship by being registered (within 2 weeks of his birth) by his father with a Japanese consular official.

Neither the jus sanguinis principle nor registration law of Japan establishes dual nationality of a resident citizen.

The fiction of "dual citizenship" cropped into an undeserved prominence in General DeWitt's incredible "Final Report" where this term was employed as an unjustifiable excuse for the brutal evacuation from the Western States of a whole segment of our citizenry upon a discriminatory ancestral basis. That general to the contrary notwithstanding there is no such thing as an American citizen possessing dual citizenship. Since December 1, 1924, there has been such a practice as the registration of infants within a period of two weeks from their births at Japanese consulates by a number of alien parents of native-born Americans of Japanese lineage. Thereafter an entry of such births is made in the "Koseki", a municipal register maintained at the alien father's ancestral home in Japan. By this type of registration

alien parents may have imagined their children would be entitled to exercise rights in Japan if thereafter they were to acquire residence there. A child two weeks of age, however, is not *sui juris* and could not prevent such a registration. A parent can neither confer nor destroy a child's citizenship status. Consequently, such a registration does not bind an infant and has no legal significance. An infant does not have to disclaim such a registration. Congress already has repudiated the act and disavowed the claims of foreign governments to the allegiance of our native-born in Title 8 USCA, sec. 800.

Citizenship in many European and Asiatic countries depends upon the *jus sanguinis*, as witness Germany, France, Italy, Switzerland, Turkey, Bulgaria, Japan and other foreign governments. It makes little difference that some countries following the *jus sanguinis* might assert that nonresident descendants of their citizens automatically become citizens subject to their jurisdiction or that they are entitled to such citizenship wherever they might reside. At most, it is nothing but an offer or invitation to exercise privileges held out to foreign descendants of their own citizens. No American citizen can accept such an offer or invitation while within our jurisdiction. Congress expressly has repudiated such a status, offer and claim of foreign governments. Citizenship in the United States depends entirely upon the *jus soli* as announced in the 14th Amendment and not upon the *jus sanguinis*.

Under its sabre-rattling Third Reich, Nazi Germany did not confer its citizenship under the *jus sanguinis*. It went farther. It claimed that all persons of German ancestry,

wherever situated, owed it allegiance. Japan, however, never entertained like pretentious claims. Up to December 1, 1924, it offered foreigners of Japanese ancestry (Nisei, Sansei, etc.) a right to formal naturalization under the *jus sanguinis* if and when they acquired residence in Japan.¹¹ It made a like offer to such foreigners born since December 1, 1924, if their births first had been registered in their ancestral family Koseki.¹² It never claimed, however, that non-residents who were citizens of other countries were naturalizable or owed it any allegiance.

A number of alien Japanese parents of American citizens have registered their infants' births under an erroneous belief that they were obliged so to do to satisfy a duty laid upon them by Japanese law but the registration

¹¹The Nationality Act of Japan, Stat. No. 66 of March 16, 1899, as revised by Stat. No. 27 of 1916 and Stat. No. 19 of 1924 (Genro Horei Shuren, pp. 929-930), provides as follows:

Art. I. A child is regarded as a Japanese if its father is at the time of its birth a Japanese * * *

Art. 20, Sec. 2. A Japanese who, by reason of having been born in a foreign country designated by Imperial Ordinance, has acquired the nationality of that country, and who does not as laid down by order express his intention of retaining (Japanese) nationality, loses his Japanese nationality retroactively from his birth.

(By Imperial Ordinance No. 262, Official Gazette, 17 Nov. 1924, the United States of America was designated a foreign country under Art. 20, Sec. 2.)

¹²Since December 1, 1924, under Article 2 of the Japanese Nationality Enforcement Regulations, it is provided that Japanese nationality of a foreign born child of Japanese nationals cannot be retained unless the birth of such child is reported by the father to a Japanese embassy or consular officer under Article 72 of the Family Registration Act and the name of such child thereafter is registered in the father's "koseki", a municipal family registry record of the father's ancestral line. See, 14 *Genro Hori Shuren*, page 952.

was of no significance. It did not and could not create an allegiance to Japan on the part of the infant citizens of the United States which expressly has been repudiated and disavowed by Congress as being "inconsistent with the fundamental principles of the Republic". It could not convert an American child into a native, citizen, denizen or subject of Japan. There is neither a legal nor a moral duty incumbent upon a native-born American to divest himself of such a registration. Why should he disavow a registration of which he could have no personal recollection and which he could not have prevented and which could not bind him? Why should he notify a foreign government that he does not recognize it and that the United States does not recognize it and then take the time and trouble and incur an unnecessary expense to cancel a registration made by a parent without his knowledge and consent by resort to litigation nowhere authorized or recognized by our law?

It is significant that, although there was no duty incumbent upon them so to do, Japanese descended citizens of this country have done more to shake off the implications of a registration they never solicited than have citizens of European stock. No one, however, ever heard of our citizens of German, French, Italian, Turkish, Bulgarian and Swiss stock taking any legal steps to shake off the implications of such a registration. Why, then, should our citizens of Japanese stock? Such a registration does not create dual citizenship and allegiance. It does not create disloyalty or hostility to this nation. If we are to suspect citizens of disloyalty simply because their births

were registered with a foreign government by parents or relatives when they were swaddling infants we would have had to suspect all German, French, Italian, Swiss, etc. descended citizens of disloyalty. We would also have to entertain serious doubts about the loyalty of all our citizens because all of us are descended from foreign stock. Even the Indians must be suspect for they appear to be descendants of Mongolians. We conclude that all that the silly suspicion against our citizens of Japanese ancestry which arises out of the fictitious charge of dual citizenship proves is that there is not only a want of logic but a lot of juvenility and nonsense in prejudiced minds.

National and state citizenship.

In the United States a "double citizenship" exists, under the 14th Amendment, as to each resident who is a citizen by birth or by naturalization. These are: (1) membership in the nation as a whole from which a person derives nationality and (2) membership in a State in which he resides, as provided by the laws of the respective States. Americans residing within a State are subject to two governments, one national and the other the State. They owe allegiance and obedience to the laws of both sovereigns and in return are entitled to demand and receive protection from each. See 14 *C.J.S.* 1131, sec. 2, and cases there cited.

A simple renunciation of national citizenship, if possible and valid, would not automatically deprive a resident renunciant of State citizenship in the absence of a

State statute so providing. It could not render the renunciant subject to removal by the federal government because that would constitute an invasion of the rights of the States, depriving the States of their citizens and of the allegiance of those citizens. It would contravene the provisions of the 9th and 10th Amendments also. The federal government may not rightfully interfere with the sovereignty of the States and, consequently, cannot impair State citizenship. One might be barred, however, from asserting his substantive right to both by expatriation.

IV.

NEITHER RENUNCIATION NOR EXPATRIATION CAUSES IRREVOCABLE LOSS OF CITIZENSHIP.

The 14th Amendment makes "all persons born—in the United States—citizens of the United States and of the State wherein they reside". Obviously, citizenship, a substantive status granted and guaranteed by the Constitution, cannot be destroyed by Congress, the Executive or the Judiciary. Sec. 8, subd. 4 of Art. I of the Constitution empowers Congress "to establish an uniform Rule of Naturalization" but no like power is conferred upon that body to establish a rule, uniform or otherwise, whereby the substantive right of citizenship granted by the 14th Amendment may be taken away. The grant creating national citizenship is of a constitutional dignity equal to that of the creation of the divisions of government and can no more be legislated away than Congress could legislate itself out of existence. Citizenship is the substance and

fibre of the Constitution. What Congress may not take away the Attorney General may not take away.

Simple expatriation merely bars adjective right to assert but does not destroy substantive citizenship.

Congress is empowered, however, to prescribe what act or acts shall constitute the expatriation of a person and his forfeiture of our protection abroad as well as to prescribe the requisites for a resumption of citizenship rights by an expatriate. See 14 *C.J.S.* 1142, sec. 15. See also Title 8 USCA, sec. 372, now repealed, and replaced by Sec. 701(d). The bar raised by Congress in this respect, however, is a procedural or adjective one in the nature of a rule of evidence which does not destroy but leaves intact the substantive right of citizenship. The bar is in the nature of a procedural estoppel precluding the expatriate from asserting his substantive right of citizenship in a proper forum unless he first pursues the procedural method Congress has set up in the Nationality Act of 1940 to enable an expatriate to resume citizenship rights. Since the repeal of Sec. 372(a) expatriates must follow the procedure required of aliens generally. Formerly, until the adoption of that Act, an expatriate was permitted to resume citizenship through the medium of a simplified procedure authorized by Sec. 372(a).

In effect, expatriation is a suspension but not a destruction of citizenship. The expatriate is barred from asserting his American nationality in our forums until, after complying with our immigration and naturalization laws, he is authorized to assert his citizenship. See 14 *C.J.S.* 1142, sec. 15. Thus it has been held that, in the absence of

any statutory provision to the contrary, a citizen of the United States who is domiciled therein remains such notwithstanding he has taken an oath of allegiance to a foreign country. *Fish v. Stoughton* (NY), 2 Johns Cas. 407. In general, however, the taking of such an oath, when coupled with a change of domicile, is sufficient to raise the bar. *Browne v. Dexter*, 66 Cal. 39, 4 Pac. 913; 14 C.J.S. 1144, sec. 15.

An expatriate can resume American citizenship privileges only upon statutory terms laid down by Congress in our naturalization laws which are procedural or adjective ones. *Reynolds v. Haskins* (CCA-Kans.), 8 Fed.2d 473; *Chacun v. Eighty-Nine Bales of Cochineal* (CCA-Va.), 5 Fed. Cas. No. 2568, 1 Brock 478, affirmed, 7 Wheat. 283, 5 L. Ed. 454. Congress could forbid expatriation and, upon apprehension, subject the expatriate to criminal penalties for violation of its mandate.

Inasmuch as an expatriate may resume citizenship it must be assumed that if renunciation were legally possible a renunciant who had never departed from his native soil also could resume citizenship upon compliance with our naturalization laws. Were the renunciation of a resident citizen to be deemed constitutional the act of renunciation would not destroy the substantive right of citizenship but would suspend it. The renunciant would be entitled to resume citizenship upon compliance with the naturalization laws if he were deemed "racially" eligible to naturalization. However, the renunciation statute, Title 8 USCA, sec. 801(i), authorizes acts contrary to sovereignty and destructive to the citizenship conferred by the

14th Amendment and, in consequence, is unconstitutional and void on its face.

The Constitution grants citizenship absolutely and without qualification to the native-born. The expatriation laws can be justified only on the theory that they set up a temporary bar to the exercise of citizenship rights which the individual can remove. Otherwise they would be unconstitutional. Here, however, the appellees, by virtue of being of Japanese lineage and hence of a so-called race ineligible to citizenship would have no method of regaining citizenship rights if their renunciations were deemed valid because the naturalization laws would preclude a recovery of citizenship rights. Consequently, in so far as Title 8 USCA, sec. 801(i), attempts to make loss of citizenship rights irrevocable, it is unconstitutional.

V.

EXPATRIATION AND REMOVAL TO AN ENEMY COUNTRY WHILE A STATE OF WAR EXISTS ARE FORBIDDEN AS BEING TREASONABLE.

The rule at common law was that a citizen or subject was forbidden to expatriate himself without the express consent of his sovereign. *Shanks v. Dupont* (SC), 3 Pet. 242, 7 L.Ed. 666; 14 C.J.S. 1142, sec. 14. Our Courts early questioned the wisdom of that rule (*Reynolds v. Haskins* (CCA-Kans.), 8 Fed. 2d 472) with the result that expatriation now is recognized as a natural and inherent right but exercisable only during peacetime. See Title 8 USCA, secs. 801-807 and 800. Under the provisions of Title 8, USCA, sec. 16 (Act of March 2, 1907, 34 Stat. at Large,

p. 1128, c. 2534) an American citizen could not expatriate himself when the country was at war. *In re Bishop* (DC-NY), 26 Fed. 2d 148; *In re Grant* (DC-Cal.), 289 Fed. 814; and 14 *C.J.S.* 1142, sec. 14. That section, however, was repealed by the Act of October 14, 1940, c. 876, Title 1, subchp. V, sec. 504, 54 Stat. 1172, and was not reenacted in the Nationality Act of 1940. Upon its repeal, however, the common law rule forbidding expatriation during war-time was revived. The common law federal rule, which is an underlying part of the Constitution itself, is that neither the renunciation nor the expatriation of citizens is permissible during wartime. In addition, in Title 22 USCA, sec. 223, Congress has authorized the President to forbid any person from entering or leaving the country during wartime. As hereinafter argued, if a state of war still exists, expatriation to Japan or removal thereto under the Alien Enemy Act likewise would be unlawful, both types of departure being prohibited as acts of treason. On the other hand, if the state of war has terminated expatriation has become permissible but the Alien Enemy Act has expired and removal thereunder has become unlawful.

If a citizen or subject of the United States cannot depart from this country and take up residence in an enemy country during the existence of a state of war he cannot become an expatriate. Likewise neither a citizen nor a resident renunciant can be removed to an enemy country while a state of war exists. In either type of departure the aim would be either a voluntary or an involuntary departure from this country and the consequent loss or evasion of the performance of obligations to this country

and the likelihood of such a person bearing arms against us after his arrival in enemy territory. Consequently, expatriation and forcible expulsion and removal to enemy territory under the Alien Enemy Act while a state of declared war exists are forbidden as being contrary to the sovereignty of this nation and as being treasonable under Sec. 3 of Art. III of the Constitution. Even the repatriation of an enemy national would be forbidden as an act of treason unless he were exchanged for a prisoner of war. However, if the right of expatriation has been revived by the cessation of war the power of the Attorney General to remove anyone under the Act has terminated. That Act, however, has never had proper application to a resident renunciant who, by renunciation, could become only a resident noncitizen, subject or stateless person if the renunciation was constitutional and valid.

Obviously, any statute which might be enacted (and there is none now existent) which would authorize the departure or removal of a citizen, subject or resident to a belligerent country with which this country officially was at war would contravene the provisions of Sec. 3 of Art. III of the Constitution inasmuch as it would authorize a supply to the enemy of soldiers who could take up arms against us and of workers who could aid the enemy cause. Such is prohibited as levying war against us and as authorizing adherence to our enemies, giving them aid and comfort. It is possible, therefore, were we to concede the constitutionality and legality of renunciation, that Congress, without infringing on the constitutional prohibition against treason, could authorize simple renunciation dur-

ing war time but could not authorize expatriation, removal or departure to a hostile country during wartime.

Congress declares, in Title 8 USCA, sec. 601(a) that persons "born in the United States and subject to the jurisdiction thereof" shall be "nationals and citizens of the United States at birth". The statute implements the 14th Amendment. Congress could repeal this statute but such a repeal would not impair the grant of the 14th Amendment.

It is extremely doubtful that Congress could authorize renunciation of U.S. citizenship at any time when it is considered that our national survival is dependent upon the unimpaired maintenance of the citizenship status. If it cannot whittle away the Constitution it follows that it cannot deprive the Constitution of the citizens which constitute its support. We do not believe that it can authorize the renunciation of citizenship or the expulsion of citizens of this nation and thereby destroy not only the grant of the 14th Amendment but impair the foundation of the Constitution itself. It may authorize punishment for citizens guilty of infractions of law and may set up procedural bars against the assertion of citizenship but may not destroy the substantive citizenship status. In consequence, we conclude the renunciation statute to be void for being repugnant to the Constitution.

VI.

IF RENUNCIATION IN WAR TIME IS CRIMINAL THE GOVERNMENT WAS PARTICIPE CRIMINIS AND WAS GUILTY OF ENTRAPMENT WHICH WOULD RELIEVE RENUNCIANTS FROM PUNISHMENT IN ANY FORM.

If the Attorney General contends that renunciation of nationality, whether or not it was followed by a request to depart from the country, was criminal or quasi-criminal in nature and subjected them to removal to a foreign land for such a reason, we direct attention to the fact that the legal significance of the act was unknown to the renunciants and the intent of the Attorney General to deport them was concealed from them until after the war had ended.¹³

Inasmuch as the Attorney General takes the view that a citizen was transformed by renunciation into an alien

¹³The letters from the Assistant Attorney General Herbert Wechsler notifying many of the petitioners that their renunciations were accepted did not inform them that the Government viewed them as alien enemies and that it intended to remove them to Japan. The letters indicate the official view was that the renunciants no longer were citizens and that they had become stateless. Those letters read as follows:

"You are hereby notified that, pursuant to Sec. 401(i) of the Nationality Act of 1940, as Amended, and the regulations issued pursuant thereto, your renunciation of United States nationality has been approved as not being contrary to the interests of national defense. Accordingly you are no longer a citizen of the United States of America nor are you entitled to any of the rights and privileges of such citizenship."

Although hundreds of the internees sent letters to the Attorney General rescinding their applications for renunciation long before they received notice of approval his office recklessly disregarded their letters and insisted on accepting renunciations even though they had been cancelled. His office sent out hundreds of such notices to petitioners after these proceedings had been initiated and addressed many of them to the Tule Lake Center months after it had been closed out and the renunciants had returned to their homes.

enemy and that it constituted a form of adherence to the enemy we direct attention to the fact that the Government itself, through the instrumentality of the Attorney General's office, induced the renunciations and, in consequence, the action of the government was treasonable and constituted an "entrapment" which rendered the government's actions void and the petitioners' actions unpunishable. See *Woo Wai v. U. S.* (CCA-9), 223 Fed. 412. The renunciation statute, therefore, as applied to the appellees, is unconstitutional and void for authorizing adherence to the enemy, and, in consequence, of treason in violation of Sec. 3 of Art. III of the Constitution.

VII.

ALIEN ENEMY ACT HAS NO APPLICATION TO APPELLEES.

The Alien Enemy Act is an emergency war measure designed to insure the public safety. It empowers the President to restrain the activities of alien enemies during the period of hostilities. It is invoked by a presidential proclamation. It terminates when the hostilities which called it into operation cease or within a reasonable period of time thereafter when the public safety is secured or when peace is declared to have been restored either by presidential proclamation or by a declaration of Congress. The restraint which it authorizes against alien enemies takes two forms, (1) the detention and removal of hostile alien enemies, Sec. 21, and (2) the removal of alien enemies not charged with actual hostility, Sec. 22. Detention effectively prevents the commission of hostile acts against us and thereby insures the public safety.

Removal to Japan while a state of war exists is forbidden as an act of treason for giving aid and comfort to the enemy.

The Act was not designed to authorize hostile alien enemies to be removed to a belligerent country of which they were nationals but to authorize their detention for security reasons. It allows the President an election to detain or remove suspected alien enemies to areas where they could not harm us. (See Sec. 22.) The Act certainly could not have been devised to authorize the President or any executive officer to send able-bodied alien enemies to an enemy belligerent country where they might take up arms against us. It could not have been the congressional intention to authorize the supply of soldiers to an enemy country to bear arms against us. Such would violate the constitutional inhibition against treason. See Sec. 3 of Art. III of the Constitution. If therefore, a state of war with Japan still persists and will continue until peace formally is declared no person asserted by the Government to be a dangerous alien enemy is removable to Japan under that Act or any other act because such a removal in itself would constitute an act of treason unless such a person were exchanged for a prisoner of war. (In his affidavit, R. 152, in No. 12251, Mr. Burling admits it was the government's intention to exchange Japanese aliens and interned Nisei for prisoners of War held by Japan.)

It is to be inferred that the removal to which the Act relates is of a type that would prevent an alien enemy from bearing arms against us and from committing hostile acts against us. It would be conceded, of course, that the Act does not preclude the executive from exchanging hostile alien enemies for American prisoners of war. It is

to be assumed that Congress intended that the President, in his discretion, might arrange also for the voluntary departure or removal of alien enemies laboring under a physical or mental disability along with their alien born children of tender years to points where they could return to their native land. It is not to be assumed, however, that alien enemies who were not physically or mentally incapacitated likewise would be permitted to return to their native land. The Act authorizes the removal of enemy nationals suspected of being a potential menace to our security by transfer to a non-belligerent country or to a place within or without our continental limits and jurisdiction where isolation would render them unable to injure us. Obviously, however, Congress contemplated that only hostile alien enemies who were of military age or were able to contribute services to the enemy cause would be isolated and detained for the duration of war.

The power of removal lodged in the Executive would not seem to be a wholly arbitrary and irresponsible one. Inasmuch as resident nationals of an enemy country are entitled to constitutional rights it would seem that they are entitled, under the due process clause, to a fair hearing on the question of an existing necessity for their internment and removal. The Attorney General granted such an administrative hearing to each German, Italian and Japanese national who was detained under the provisions of the Act and released all except a few of them who were removed to their native lands after the last of the Axis nations surrendered. The renunciants, however, were never given like administrative hearings either on the

grounds or necessity for their original evacuation or for the prolonged imprisonment imposed upon them. Evidently our recent Attorneys General in rotation, following the trail blazed by General DeWitt and the WRA, believe due process to be of such little importance that they withheld it from citizens and reserved it for enemy nationals.

The Alien Enemy Act has lost its efficacy.

Like martial law, in being founded upon necessity, the authority to detain and remove alien enemies under the Alien Enemy Act would seem to terminate when the necessity ceases which called it into existence. It would not seem to require a formal declaration for its termination. The reason therefore would seem to be the necessity rule so aptly expressed in *Ex parte Milligan*, 4 Wall. (U.S.) 2, viz., "As necessity creates the rule, so it limits its duration". The conditions which called it into existence on December 7, 1941, cannot be extended artificially by executive silence or fiat. Mere political expedience neither justifies nor legalizes the continuance of an emergency war power into a postwar period. Congress did not frame the statute to be used as a pretext to extend executive power thereunder beyond the cessation of hostilities. It is not a self-perpetuating statute. The war actually ended on August 10, 1945, when Japan surrendered. September 2, 1945, was officially proclaimed V-J Day by President Truman and on December 31, 1946, he issued a Proclamation which officially proclaimed the "cessation of hostilities of World War II." On February 19, 1947, White House advisors informed the Press (see S.F. Call-Bulletin of that date) that:

“The end of emergency declaration, expected before mid-summer, if Congress acts promptly on today’s recommendations, will be followed later by a declaration of the end of the war itself.”

There has not been, however, any official declaration of the end of the war or a declaration of peace made by the Congress or the President. Because of the existence of the cold war with the USSR it is likely that no peace treaty will be entered into between the Allies and Japan within the foreseeable future. Inasmuch as there must be an end to everything in time—and even to executive wartime power which invades fundamental constitutional rights of aliens—it would seem that the Alien Enemy Act, having served its wartime purpose has reached its termination.

On June 21, 1948, the Supreme Court, in *Ludecke v. Watkins*, 335 U.S. 160, reached the conclusion that as at that time the Alien Enemy Act still was enforceable. Whether or not it would take the same view at this late date is a matter for speculation. The validity of detention and doubtlessly of removal is determined by conditions existing at the time an application for a writ of habeas corpus is decided on appeal. See *Stallings v. Splain*, 253 U.S. 339, 343, and *Mensevich v. Tod*, 264 U.S. 134, 136.

The abnormal conditions which exist for a short period following war do not revive emergency war powers which invade fundamental constitutional guarantees. Statutes which depend upon war conditions for their vitality may be extended beyond the termination of war only with congressional approval. Congress has not authorized the protrusion of the Act into the post-war period. Since it has

been on the statute books no previous attempt has been made by any executive officer to restrict personal liberties by stretching its operation beyond the actual war period for which it was intended. Inasmuch as the application of the Act during war suspends the constitutional rights of aliens affected thereby its extension into the post-war period contravenes the 5th Amendment. Rights which the Administration may ignore during time of war may not be suspended thereafter without offending the Constitution. The Attorney General, however, seeks to perpetuate his power under the Act beyond all reason and as though given to unconstitutional action as a matter of executive policy.¹⁴

Neither the detention nor the removal of alien enemies who once might have been deemed or suspected to have been hostile to us now would seem to be warranted. If the Alien Enemy Act could be used to justify such a detention at this late date it is obvious that, instead of being a war-time measure, it has been distorted by executive practice into a continuously applying statute simply to excuse the permanent detention or deportation of aliens at the whim and caprice of the President or the Attorney General. Such, however, never was the congressional intention. Indeed, there is nothing in the Act that may be construed as delegating to the Executive an authority to wield such an autocratic power beyond the hostility period. The due

¹⁴The abandonment of price regulations in October, 1946, demonstrated how reluctant the executive branch is to surrender its war-time powers. It waited until the country had been brought to the brink of a general economic collapse and then surrendered its controls only because their retention threatened to produce and did produce a revolt at the polls.

process of law guaranteed by the 5th Amendment excludes any notion that Congress or the President might deprive aliens of their basic constitutional rights. A temporary suspension of those rights finds some justification where an overwhelming public necessity requires emergency measures be taken, as suggested in *Hirabayashi v. U. S.*, 320 U.S. 81, but those rights revive when the emergency terminates.

VIII.

INCONSISTENT ATTITUDE OF THE ATTORNEY GENERAL.

No longer can the public safety be claimed to justify either the detention or removal of persons who were alien enemies during the war period, at least, not with intellectual honesty. The nationals of Italy, Germany and Japan who were within our jurisdiction ceased to be alien enemies upon the unconditional surrender of their governments and, in consequence, became simply "aliens" to whom the Alien Enemy Act no longer applied. Since the end of hostilities the detention and removal of nationals of countries previously hostile to us has become not only untenable but improper and illegal. Since then our ordinary criminal laws alone have been in force and are adequate to preserve the public peace. Their enforcement is sufficient guaranty against criminal acts on the part of citizens and aliens in our midst. They do not require arbitrary implementation by executive fiat.

It is significant that none of the appellees at any time has been accused, tried or been found guilty on any charge of actual hostility or other crime against the nation. The

renunciation hearings had no reasonable relation to any such charge. They involved a mere question whether or not a renunciation was contrary to the interests of national defense. No other question was involved in those pseudo-hearings. A finding by the Attorney General that a renunciation was not contrary to national defense interests was, in itself, a finding that a renunciant was not hostile to us and that he did not present any clear and present danger to our government.¹⁵ In the face of such finding the Attorney General is peculiarly inconsistent in asserting them to be dangerous.

Several months after the proceedings below were commenced the Department of Justice awakened to the realization that if it was to justify a removal program on the ground the renunciants were removable under the Alien Enemy Act it must accord them notice of removal as prescribed by its own regulations which were adopted under authority of Sec. 22 of that Act. Belatedly it set about sending out notices to each then detained person that he or she would be removed to Japan.

Nevertheless, all the interned Nisei except the appellees since then have received outright releases from detention.

¹⁵For many months the Department of Justice took the view that renunciation did not transform a person into an alien enemy or a person dangerous to our security. A characteristic statement in Edward J. Ennis' (Director of Alien Enemy Control Unit) form letters to renunciants seeking cancellation of their renunciations evidenced that view. His statement, taken from his letter of July 27, 1945, to Yoshio Taniguchi reads as follows:

"The meaning of this approval is not at all, as you suggest in your letter, a finding by the Attorney General that the renunciant whose application he approves is himself dangerous to the United States. The Attorney General in approving merely finds that to allow the renunciation will not itself injure the interests of national defense."

Before V-J Day the Department held all the internees in detention without threat of removal to Japan. Thereafter it held them for removal to Japan as though they were alien enemies whether or not their renunciation applications had been accepted or rejected. After the pseudo-hearings on the orders to show cause why they should not be removed to Japan had been held and before those examinations had been completed the Department classified 449 as not entitled to release. Thereafter it labeled them alien enemies scheduled for deportation. Thereafter it released a large number of the latter. Thereafter it relaxed the internment on a majority of the remainder and held a few family groups at Crystal City and others at Seabrook Farms. The Department labeled them dangerous one day and harmless the next. Thereafter, all the interned Nisei were released to their counsel.

Several hundred young men who were veterans of the recent war and had served honorably in our military forces found themselves imprisoned without cause in the Tule Lake Center. They had served in 1940, 1941, and 1942 but were released from active duty when the Government, without cause, first discharged them and then proceeded to treat them as alien enemies. It deliberately classified them as "alien enemies" by giving them and all interned males of draft age the draft classification of "4-C" for no reason except that they happened to be of Japanese lineage. In this concentration camp an appreciative government permitted them to meditate upon the gratitude of the Government they had defended willingly and upon the "Four Freedoms" for which they had fought but which were denied them and their families.

After they had been ousted from the service and interned they were subjected to the duress that the Government permitted to exist in that Center. As the result of said mistreatment, repudiation and the duress to which they were subjected they renounced nationality and a grateful Attorney General, after the close of the war, decided to brand them dangerous alien enemies and to remove them to Japan. Many of these abused veterans and members of their families were petitioners in these proceedings. Many more were disappointed young men whom the government for several years refused to draft or to accept as volunteers during their detention. Several hundred of the male petitioners below and a number of the appellees were inducted or volunteered for military service and are serving with honor, a fact which should have convinced the Attorney General that renunciation had nothing to do with disloyalty. All that these ever asked was that the government treat them as citizens and give them a chance to act as normal citizens. Apparently the Attorney General views an honorable military record and tenders of such service as evidence of disloyalty and hostility to this nation. We submit, however, that the rest of the nation views the evidence as conclusive of their loyalty and devotion.

On June 29, 1946, this Court, in *Takeguma v. U. S.*, 156 Fed. 2d 437, 440, declared that renunciants detained in these concentration camps were subject to induction into the armed forces. It was the policy of the Attorney General to permit interned Nisei to register for the draft and to enlist direct from a concentration camp. Army headquarters throughout the nation welcomed renunciants

into the service with full knowledge of the fact of renunciation, recognizing that renunciation had no relationship to disloyalty or hostility to this nation. It is utterly inconsistent executive government action for the Attorney General to have detained and threatened renunciants with removal to Japan while they were being inducted into the Armed Services from imprisonment and the army authorities were willing to accept them.

IX.

DETENTION AND REMOVAL OF APPELLEES IS FORBIDDEN AS BILL OF ATTAINDER AND EX POST FACTO LAW.

In continuing the original unlawful imprisonment of the appellees and in having ordered their internment and removal to Japan the Attorney General usurped legislative power and actually decreed a *bill of attainder* which even Congress is prohibited from passing by Sec. 10 of Art. I of the Constitution. His order is void as an *ex post facto* law or regulation prohibited by Sec. 10 of Art. I of the Constitution because he thereby decreed the act of renunciation to be unlawful and punishable by removal although that act was declared by Congress to be lawful and neither punishment nor other penalty was prescribed for an exercise of that right by Congress.

X.

BANISHMENT IS VOID FOR VIOLATING FIFTH AND EIGHTH
AMENDMENTS AND PRESIDENTIAL PROCLAMATION NO.
2655.

Each of the appellees is a native-born resident of the United States and is domiciled in this country. In consequence, the banishment of such persons, whether they be considered citizens or non-citizens, is a type of *infamous punishment* inflicted upon them in the absence of crime on their part and simply because of their color or race and, as such, is forbidden by the 5th Amendment. See *In re Yung Sing Hee* (CC-Ore.), 36 Fed. 437; *U.S. v. Moreland*, 258 U.S. 433; and opinion of Mr. Justice Brewer in *U.S. v. Ju Toy*, 198 U.S. 253, at 269-270, declaring banishment to constitute a *cruel and unusual punishment* forbidden by the 8th and 5th Amendments. See also, *Ex parte Wilson*, 114 U.S. 417, 428.

Congress neither authorized nor approved the detention or banishment of renunciants. Nowhere did it intimate that renunciation would be followed by detention and banishment under the Alien Enemy Act or any other statute. In detaining the renunciants for deportation to Japan the Attorney General exercised extra-constitutional power and usurped the functions of the legislative and judicial branches of the government. In addition he also usurped executive discretionary power in so doing for it is to be noted that Presidential Proclamation No. 2655 contains no direction to him to treat renunciants as though they were alien enemies.

XI.

INTERNMENT VIOLATES 13TH AMENDMENT.

Internment is a condition of slavery and involuntary servitude, imposed not for crime but solely by reason of the appellees' type of lineage and is forbidden by the 13th Amendment. See *Slaughter Houses Cases*, 83 U.S. 36. In the W.R.A. camps internees were put to work assigned by the authorities in charge at peon wages. See *W.R.A. Manual*, Chp. 50.5, par. 6-A et seq. In the internment camps they received less. The camp authorities were not content with having them remain slaves solely of the government, however, and for the private profit of the W.R.A. personnel exploited hundreds of them through the medium of the slave labor racket they established. See R. 285-6 in Nos. 12251-2.

XII.

NATIONALITY REGULATIONS AND RENUNCIATION STATUTE
ARE VOID FOR UNCERTAINTY AND FOR CONTAINING UN-
LAWFUL DELEGATION OF LEGISLATIVE AND JUDICIAL
POWER.

In seizing and holding the appellees from 1942 until they were delivered into the custody of the Attorney General in 1945 without charging them with crime, without informing them of the nature and cause of any accusation against them and without affording them trials on the cause or necessity therefor the military and W.R.A. authorities usurped legislative and judicial powers in violation of Arts. I and III of the Constitution and transgressed the guaranty of the 6th Amendment and the due

process clause of the 5th. In essence this treatment was a prejudgment of a body of our citizens occurring in the recesses of the minds of those authorities and in the absence of their victims. In prolonging the detention from 1945 to 1947 when they were released into the custody of their counsel, the Attorney General was guilty of like usurpation of power and like misconduct. The right to wield such judicial power is denied military commanders, federal administrative agencies and executive officers. Executive suspension of the civil rights of civilians outside the actual theatre of war where martial rule necessarily obtains has no constitutional sanction. See *Ex parte Milligan*, 4 Wall. (U.S.) 2, and *Duncan v. Kahanamoku*, 327 U.S. 304, 322.

The evacuation and internment of citizens from 1942 to date without a charge of crime being lodged against them constituted a deprivation of all citizenship rights and hence of citizenship itself. Obtaining renunciations from citizens illegally interned and illegally deprived of all the rights of citizenship without cause, hearings or justification does not validate or justify either the renunciations or the detention or removal of the appellees. It is just an addition to the long series of crimes committed by the Government against them.

The Attorney General knew the appellees were citizens illegally interned and treated as though they were criminal alien enemies and that while so interned and abused that they renounced nationality at his invitation while laboring under duress. Nevertheless, he set himself up as an administrative tribunal-sole to declare them dangerous alien enemies and to order their removal to Japan.

If the renunciation statute, Title 8 USCA, sec. 801 (i), be deemed to vest such a power in the Attorney General it is void as an unlawful delegation of legislative and judicial power prohibited by Arts. I and III of the Constitution. If it were deemed that such power were delegable at all it must be admitted that the power to declare citizenship forfeited is a judicial one beyond the reach of the Attorney General.

The renunciation statute, Title 8 USCA, sec. 801 (i), purports to delegate to the Attorney General legislative and also judicial power to determine the persons from whom he may accept renunciations and the conditions and circumstances under which he may approve renunciations. Such a delegation of authority is prohibited by Arts. I and III of the Constitution. See *Field v. Clark*, 143 U.S. 649, 692. It is also void for uncertainty and for delegating to the Attorney General, an executive officer, an arbitrary and unlimited discretionary authority to approve renunciations without setting up any standards, guides or policies to which he is to conform in approving renunciations. Such a delegation of legislative power is unconstitutional as forbidden by Art. I of the Constitution. *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, and *Panama Refining Co. v. Ryan*, 293 U.S. 388.

The statute does not expressly or impliedly delegate a power to the Attorney General to declare that the mere act of renunciation transforms a renunciant into an alien enemy or to classify and treat him as such or to detain or deport a renunciant and, in consequence, the action of the Attorney General in detaining the appellees for de-

portation is extra-constitutional and also violative of the due process clause of the 5th Amendment.

Attention is drawn to the fact that although Title 8, Secs. 316.1 to 316.9 of the Nationality Regulations set up by Attorney General Francis Biddle on October 6, 1944, prescribe that hearings be given prospective renunciants before renunciations are accepted the Attorney General's examiners made it a practice to deny them the benefits of counsel. These regulations authorized the government examiners to consider hearsay and the contents of dossiers which were concealed from the renunciant. They gave consideration to such matters in the examination of appellees. The regulations also enabled the examiners to indulge in caprice in determining whether or not acceptance of a renunciation was to be recommended and the Attorney General to indulge in caprice in approving a renunciation. The appellees were the victims of such caprice. The proceedings were in the nature of Star Chamber proceedings. See, Sec. 316.6. Nothing is to be found in these regulations authorizing acceptance of a renunciation from a minor under 21 years of age. The Attorney General, however, accepted renunciations from minors and also from mental incompetents quite indiscriminately. (See R. 288, 307-8 and 465 in R. 12251-2 for names.)¹⁶ Nothing is to be found in the statute, regulations or in the proclamation setting forth what factors shall be given consideration in determining what renun-

¹⁶Note: In unprinted R. "Designation" filed February 25, 1949, Exh. XXII-1, and in App. XI, par. XXII, of appellant's brief it is admitted that the renunciations of known insane persons were accepted and approved.

ciations shall be accepted or rejected and, in consequence, these matters were left to the unregulated and arbitrary decision of his examiners. The delegation of such legislative powers to the Attorney General in 8 USCA, sec. 801 (i) to determine what unspecified factors are to be given consideration in determining whether or not a renunciation is "not contrary to the interests of national defense" violates Art. I of the Constitution. See *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 88.

President Truman's Proclamation No. 2655 does not declare that a citizen who renounces under the statute thereby becomes an alien enemy or subject to the provisions of the Alien Enemy Act. Neither does it define the conditions or conduct that constitutes past adherence to "enemy governments or to the principles there" which renders alien enemies liable to removal. The Attorney General usurped executive power as well as legislative and judicial power when he formally classified the renunciants as alien enemies and ordered their detention converted into internment and ordered their removal to Japan.

XIII.

RENUNCIATIONS OF INTERNED INFANTS, INCOMPETENTS AND ADULTS WHO ARE NOT SUI JURIS ARE VOID.

Neither in the renunciation statute nor in any other statute has Congress sought to authorize the approval of a renunciation from a minor under the age of 21 years. The Attorney General was not authorized by Congress to accept renunciations from minors. In passing the

statute Congress necessarily must have contemplated its application only to adult persons. If it be assumed that Congress had no fixed age for renunciation in contemplation at the time the statute was enacted its silence on the question and its failure to establish the age creates a statutory ambiguity. In dealing with the rights of a citizen under the age of twenty-one (21) years the Supreme Court has declared the rule to be that in the absence of a clear and unambiguous authorization "rights of citizenship are not to be destroyed by an ambiguity". *Perkins v. Elg*, 307 U.S. 325, 337.

Consequently, the appellees who were under 21 years of age at the time of renunciation were incapacitated by their minority from renouncing and their renunciations are invalid and void.

Attention is directed to the fact that neither the statute nor the nationality regulations authorize renunciations from children of 18, 19 and 20 years of age. It is significant that in the Nationality Act of 1940 Congress terms a minor to be a person under twenty-one years of age. See Title 8 USCA, sec. 501 (g). Nevertheless, the examining agents recommended the approval of renunciations from children and the Attorney General approved such renunciations. In addition, he approved hundreds more after the infants had written him letters rescinding the applications, his letters of approval being mailed to them as late as 1948 when they had attained their majority. As a demonstration of the utter recklessness of the government's attitude toward them, attention is directed to the fact that approval letters were addressed to them at

the concentration camps and delivery was not effected because the camps long had been closed and the internees had been restored to their homes. The government's practice does not seem to have been the result of mere error but a matter of recklessness. We believe that practice not only was unsound but contrary to public policy and violative of the due process of law guaranteed by the 5th Amendment. It also would appear obvious that the petitioners below who were mentally incompetent at the time of renunciation could not be deprived of their citizenship. If unconstitutional as to any person the statute is unconstitutional as to all persons who renounce. See *Norton v. Shelley County*, 118 U.S. 425, where Field, J., states the rule in the following language:

“An unconstitutional Act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”

The approval of renunciations of adults, minors and mentally incompetent persons during their unconstitutional imprisonment, that is to say, while they were held under duress by the government and subjected to the terrors incident thereto and for which it alone was responsible tainted all of the renunciations with incompetency. In consequence, the renunciation applications and the approvals thereof by the Attorney General are void. See *Upshaw v. U.S.*, 335 U.S. 410; *McNabb v. U.S.*, 318 U.S. 332, 341; *Malinsky v. N.Y.*, 324 U.S. 401, 405.

In addition, we wish to point out that the appellees were interned at the time of renunciation as though they

were alien enemies. At the very time the renunciation examinations were given each was confined in a closed room with government agents and was deprived of the benefit of counsel, witnesses and friends. (See R. 176-177 in No. 12251-2.) This was nothing less than detention existing within an internment for the purpose of obtaining from the internees renunciations which were void *ab initio* under the rule subsequently announced in *Upshaw v. U.S.*, 335 U.S. 410. In consequence, none of the renunciants was *sui juris*.

Further, each internee at the time of renunciation was precluded from asserting and exercising civil rights because of that internment. Each, in fact, was precluded from entering into a renunciation. See, *Trading With Enemy Act*, 50 USCA, Appendix, Sec. 3(a), prohibiting trading which, as defined in Sec. 1 prohibits any "contract, agreement, or obligation" from being entered into by an alien enemy unless specifically licensed so to do by the President. At the time of renunciation each interned citizen had been classified and treated as an alien enemy. However, the President did not license any person to renounce nationality. Consequently, inasmuch as all the appellees were interned as though they were alien enemies and were deprived of all civil rights the Government could not accept renunciations from them. It follows that because they were not *sui juris* they could not exercise the civil right of renunciation.

CONCLUSION.

All their troubles and the degrading treatment to which we have subjected the appellees flow from the first unjust governmental action which has been referred to as a mass evacuation. That enforced exodus of a people, in reality, was nothing but the initial step in an oppressive imprisonment program that continuously held them in duress for a period of over four years. It was imposed upon them simply because their blood was deemed to be tainted because they are descended from ancestors who were subjects of Japan by virtue of the accident of their nativity on Japanese soil. We do not believe that the Attorney General's appetite for justification of the cruel program requires the sacrifice of the appellees simply for governmental appeasement purposes. We believe his unwarranted detention of the appellees and his threat to remove them to Japan were and are lawless and in excess of his jurisdiction. We submit that the judgment of the court below awarding the writs and discharging the appellees from custody should be affirmed.

Dated, San Francisco, California,

February 27, 1950.

Respectfully submitted,

WAYNE M. COLLINS,

Attorney for Appellees.

Nos. 12195 and 12196

**In the United States Court of Appeals
for the Ninth Circuit**

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION
AND NATURALIZATION SERVICE, APPELLANT

v.

TADAYASU ABO, ET AL., ETC., APPELLEES

BRUCE G. BARBER, DISTRICT DIRECTOR OF IMMIGRATION
AND NATURALIZATION SERVICE, APPELLANT

v.

MARY KANAME FURUYA, ET AL., ETC., APPELLEES

*ON APPEALS FROM ORDERS OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE NORTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION*

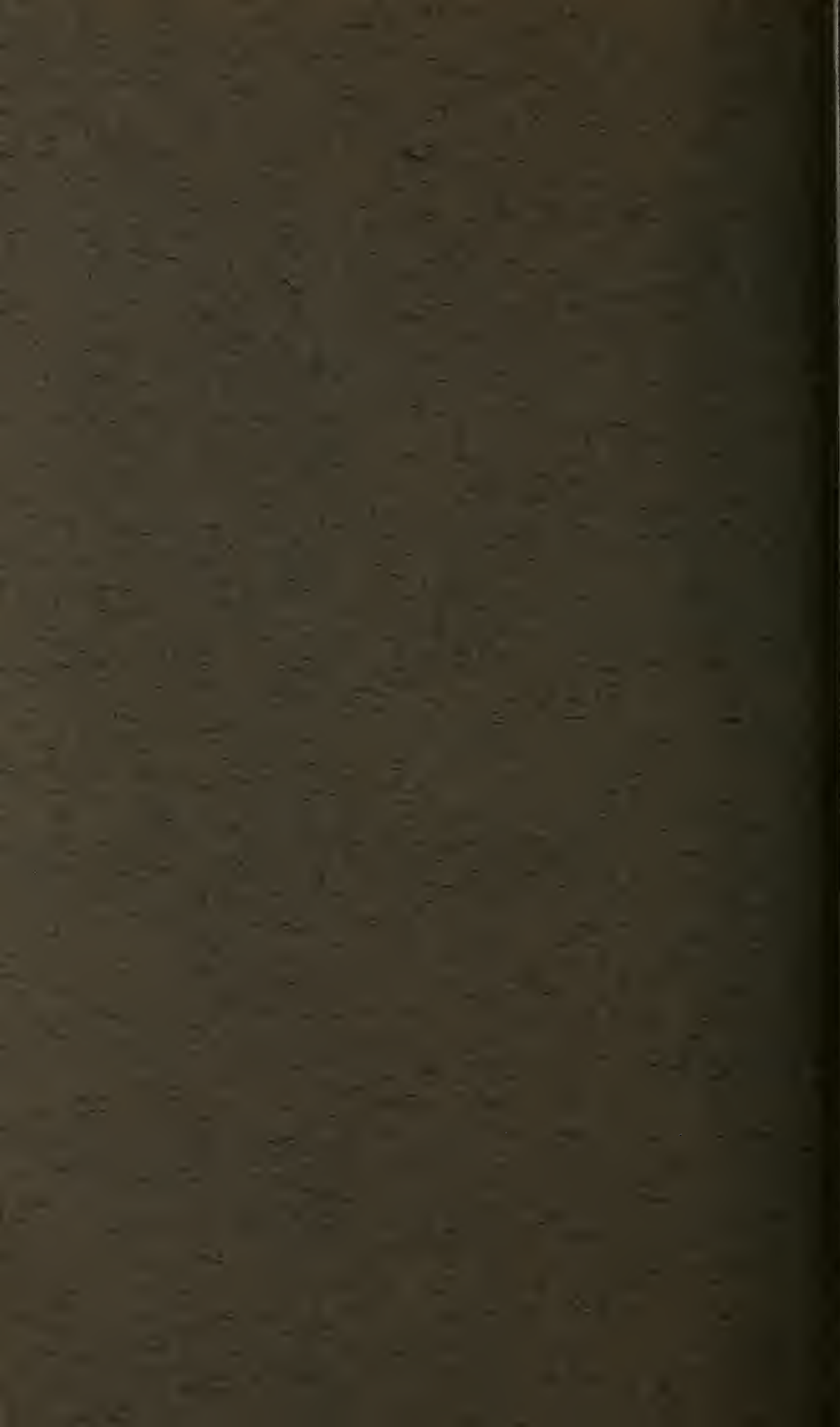
APPELLANT'S REPLY BRIEF

FILED

MAY 30 1950

PAUL P. O'BRIEN,

CLERK



In the United States Court of Appeals for the Ninth Circuit

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*ON APPEALS FROM ORDERS OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE NORTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION*

APPELLANT'S REPLY BRIEF

APPELLEES' SUGGESTION THAT THE DECISION OF THE DIS-
TRICT COURT SHOULD BE AFFIRMED ON THE AUTHORITY
OF AHRENS v. CLARK

At page 14 of appellees' brief they appear to suggest that by reason of the fact that they did not remain within the territorial jurisdiction of the District Court throughout the proceedings below, the District Court lacked jurisdiction and therefore this Court should affirm its decision. This argument, which plainly

leads to reversal rather than affirmance, is clearly erroneous. Unlike the case of *Ahrens v. Clark*, 335 U. S. 188, this case was commenced in the district in which the relators were interned under alien enemy removal orders. Accordingly, the District Court had jurisdiction, by *habeas corpus*, to inquire into the legality of the custody as of the time of the commencement of the suit. Thereafter a stipulation and order was filed on March 14, 1946,¹ which provided in part that "the plaintiffs * * * who shall be transferred, in custody, for the convenience of the Government, to an internment camp or place of restraint other than the Tule Lake Center * * * whether the same be situated at Santa Fe, New Mexico, Crystal City, Texas, or elsewhere, will be produced before the above-entitled Court for hearing for trial purposes in the above-entitled suit, upon reasonable notice, by the United States Government, the Attorney General of the United States, or Ivan Williams [predecessor in office of present appellant] as their agent." That transferral of the appellees from the district under this arrangement did not divest the Court of jurisdiction is, we submit, established by the decision of the Supreme Court in the case of *Ex parte Endo*, 323 U. S. 283, 304-307. There can be no question but that the appellees were released from custody by the Court below by a decision that was thoroughly and vigorously contested (R. 175-194). As recited in the

¹ This instrument is set forth in the record in No. 12251 herein, at pp. 86-87. See footnote No. 1 in the Appellants' brief in the case of *McGrath v. Abo*, No. 12251, as to the consolidation of that case with the instant *habeas corpus* causes in the Court below.

actual order releasing the appellees from custody (R. 195-196) the appellees moved that they be released in the custody of their attorney without the necessity of producing them "in person before this Court on September 8, 1947," as had been provided for by the writ (R. 194), in order to avoid the "hardship upon them" and "needless expense to * * * the United States" and the respondent consented to this arrangement (R. 196-197). This consent, however, was not that the appellees should be released but rather that, since the Court had decided to release them, they might be released in a particular fashion. The consent was conditioned, moreover, that it should be "without prejudice to respondent's right of appeal in the above cause" (R. 196). This appeal does not complain of the failure of the District Court to take the personal recognizance of each appellee in accordance with Rule 45 (3) of the Rules of the Supreme Court, but is from the judicial action releasing them at all. Since the District Court had jurisdiction at the time of taking the action appealed from, and since, in the event of the success of the appeal custody over the persons of the appellees will be resumed, the causes are not moot and this Court has jurisdiction. *Eagles v. Ex rel Samuels*, 329 U. S. 304, 306-308.

**THE POSTURE OF THE CAUSES AND QUESTIONS PRESENTED BY
THIS APPEAL**

Statements and arguments throughout appellees' brief lead to the impression that they assume that the decision of the District Court should be treated as having been reached after full trial on the merits. For example (at p. 28), they contend that the appel-

lant introduced no evidence in support of the averment that appellees are citizens of Japan and argue (in a footnote) that an affidavit concerning the law of citizenship of Japan is not sufficient for that purpose since it does not show "the application of any foreign law to any of the appellees." What the appellees overlook is the fact that none of the issues of fact made out by the pleadings below was tried or decided by that Court.

These *habeas corpus* proceedings were decided upon petitioners' motions for summary judgment and judgment on the pleadings (R. 154-160), and upon respondent's cross motion for summary judgment (R. 161). Here, unlike the action taken in Nos. 12251 & 12252 herein, there was no stipulation submitting the *habeas corpus* proceedings for decision on the merits. Moreover, nothing in the opinion of the District Court (R. 174-177), or in any order or action entered or taken by it, indicates that the Court intended to decide any issue of fact one way or the other.

The only question that the District Court decided, in granting appellees' motions was that they were not, within the contemplation of the domestic law of the United States, citizens of Japan prior to their renunciations of United States citizenship and, therefore, did not thereby become alien enemies. This decision was reached on legal and not factual grounds and the issues of fact raised by the pleadings were not resolved. Obviously, for the purpose of the appeal, it must be assumed that the appellant is in position to sustain each of his factual averments and denials.

THE APPELLEES' ARGUMENTS THAT ARE WITHIN THE SCOPE
OF THE APPEAL

The appellees' contentions concerning the questions of dual nationality and the applicability of the Alien Enemy Act to a renunciant, are, we believe, sufficiently covered by the appellant's main brief herein. The contentions to the effect that the period, within which the Alien Enemy Act was effective, expired with the end of hostilities is sufficiently answered, we believe, by the case of *Ludecke v. Watkins*, 335 U. S. 160, cited at p. 46 of their brief.

The contentions to the effect that Congress lacked power to authorize dual nationals to cast off their United States citizenship and thereby become solely nationals of a foreign power, are, we submit, clearly fallacious.

Since we insist that dual nationals have a right to elect United States citizenship (*Perkins v. Elg*, 307 U. S. 325) it is difficult to believe that the Constitution deprives the Congress of authority to authorize voluntary rejection of United States citizenship in favor of that of a foreign power. The Congress admittedly has constitutional power to authorize voluntary renunciations by persons when they are abroad and we are aware of no provision of the Constitution which would deny it such power in cases of persons in this country. The appellees' brief points to no constitutional provision or authority requiring such a result.

The contention (pp. 58-61) to the effect that the renunciations of persons between the ages of 18 and 21 were ineffective because such persons were under legal disability, has been met in appellants' opening

brief in *McGrath v. Abo*, No. 12251, at pp. 83-97, to which the Court is respectfully referred.

CONCLUSION

For the reasons stated in appellant's opening brief herein, the decision of the District Court herein should be reversed.

H. G. MORISON,

Assistant Attorney General.

FRANK J. HENNESSY,

United States Attorney.

ROBERT B. MCMILLAN,

Assistant United States Attorney.

ENOCH E. ELLISON,

PAUL J. GRUMBLY,

Attorneys, Department of Justice,

Attorneys for Appellant.

Nos. 12,195 and 12,196

IN THE

United States Court of Appeals
For the Ninth Circuit

BRUCE G. BARBER, as the District Director
of the U. S. Immigration and Naturali-
zation Service for the Northern District
of California,

Appellant,
(Respondent Below)

No. 12,195

vs.

TADAYASU ABO, et al., etc.,

Appellees,
(Petitioners Below)

and

BRUCE G. BARBER, as the District Director
of the U. S. Immigration and Naturali-
zation Service for the Northern District
of California,

Appellant,
(Respondent Below)

No. 12,196

vs.

MARY KANAME FURUYA, et al., etc.,

Appellees.
(Petitioners Below)

APPELLEES' PETITION FOR A REHEARING.

WAYNE M. COLLINS,

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Appellees.
(Petitioners Below)

No. 12,195

No. 12,196

APPELLEES' PETITION FOR A REHEARING.

(NOTE): The appellees herein are referred to as petitioners and the appellants as respondents.

*To the Honorable William Denman, Chief Judge, and to
the Honorable Circuit Judges of the United States
Court of Appeals for the Ninth Circuit:*

Shinichi Jimmy Aoki and Kiyoshi Wakabayashi, and all other adult appellees (petitioners below), against whom an unfavorable opinion and decisions herein were handed down by this Court reversing the judgments of the District Court below and remanding the causes as to them to that Court, demand a rehearing of their causes on appeal upon the following grounds and for the following reasons:

I.

**THIS COURT'S OPINION OVERLOOKED FACTORS WHICH
RENDER THE STATUTE VOID FOR DENYING EQUALITY
AND DUE PROCESS OF LAW.**

The renunciation statute, Title 8 USCA, Sec. 801(i) (Act of July 1, 1944 (58 Stat. 677)), was enacted by Congress at the special instance and request of the Justice Department for the disclosed sole purpose of procuring the renunciations of a special group of Nisei detained in our concentration camps simply to insure a prolongation of their unconstitutional internment and for no other purpose whatsoever. See Burling affidavit, R. 158-161 in No. 12251-2, so admitting and relating its history. It was applied to them and to no other persons or class of persons. When the renunciations of Nisei had been obtained in the concentration camps and their continued internment thereby was assured and the Attorney General had time to approve and did approve those renunciations by the middle of 1947, Congress, obviously

on the suggestion of the Attorney General, by Joint Resolution of July 25, 1947, 61 Stat. 449 at 454, *rendered the statute inoperative* along with a large number of other emergency and war power measures.

If the renunciation statute is not special class legislation there is no such thing as class legislation. If, as applied to petitioners, it was not an unequal application of the law there is no such thing as an unequal application of the law. The test of equality in the application of a law, within the rule announced in *Yick Wo v. Hopkins*, 118 U.S. 356, is not whether legislation might or could be applied equally to all persons within a proper classification but whether or not it actually so is applied. If the Justice Department can use a consenting Congress to pass temporary legislation, in the guise of permanent legislation, for it to apply only to Nisei held in prison simply because of their lineage and, so soon as its agents have procured their renunciations and the Attorney General has been given time to approve those renunciations, then has Congress render the statute inoperative so that it cannot be applied to others it is obvious the law is special discriminatory class legislation and that it was applied with an evil eye and an unequal hand.

The motive that prompted the passage of the statute, the purpose to which it was put and the fact that it was rendered inoperative immediately the special purpose had been served, thereby blocking all other persons from renouncing, demonstrates it was designed as special discriminatory class legislation and was used as such. The

short time during which it was in force in itself shows that it was to serve the limited purpose of obtaining renunciations of the Nisei arbitrarily and wrongfully imprisoned and of no other persons. The statute states on its face that it shall be in force and effect "whenever the United States shall be in a state of war." We are still in a state of war but the statute is not in force and effect. It has been operative since July 25, 1947. In consequence, no conclusion can be drawn from these facts except that the discrimination against the Nisei was a deliberate congressional and executive policy to obtain the renunciations of a special group of imprisoned Nisei and to block all other persons in prison and out of prison from like renunciations. As such it was not only special class legislation but was applied unequally and violates the due process clause of the 5th Amendment. We direct attention also to the fact that the Justice Department cannot show that it was applied to persons other than already interned Nisei.

II.

THIS COURT FAILED TO CONSIDER AND PASS ON QUESTIONS THAT THE STATUTE IS VOID FOR BEING A BILL OF ATTAINDER AND AN EX POST FACTO LAW.

Congress passed the renunciation statute to obtain renunciations from the incarcerated Nisei and from no other persons for the admitted purpose of converting their unconstitutional detention into internment just to insure their continued detention "without violating the Constitution." (See R. 160.) The Attorney General took their re-

nunciations for that specific purpose, ordered them interned and thereafter threatened them with removal to Japan although none of them had been guilty of violating any law. In consequence, the statute, on its face and as applied, is nothing but a bill of attainder proscribed by Clause 3, Section 9 of Article I of the Constitution. Further, because this punishment was inflicted upon them for what the government deemed was past disloyal conduct or expression, although no hearings on such a matter had been given them, the statute, the internment and removal orders are void for being *ex post facto* and prohibited by Clause 3, Section 9 of Article I of the Constitution. This Court failed to consider and pass on these important questions of law.

III.

THE RENUNCIATIONS ARE VOID BECAUSE THEY WERE TAKEN DURING AN ILLEGAL DETENTION AND WERE THE FRUITS OF WRONGDOING BY THE GOVERNMENT.

Further, the renunciations taken by the Attorney General while the petitioners were held in concentration camps, pursuant to the admitted governmental objective, i.e., to insure their continued detention, are illegal on their face for being "*the fruits of wrongdoing*" by the federal government and its agents. See principle announced in *Weeks v. U. S.*, 232 U.S. 383; *McNabb v. U. S.*, 318 U.S. 332; and *Upshaw v. U. S.*, 335 U.S. 410.

This Court's opinion indicates this Court failed to consider the foregoing matters and authorities although they clearly demonstrate a forbidden deprivation of due process

which voids the renunciation statute. See appellees' petition for rehearing in companion equity cases Nos. 12251-2 for amplification of these points.

IV.

REMOVAL WAS NOT SANCTIONED BY CONGRESS.

Before V-J Day the Attorney General, pursuant to his declared recommendation that resulted in the passage of the renunciation statute, i.e., that it was to be used for the purpose of *detention* (R. 160 in No. 12251), kept the renunciants interned. After V-J Day he suddenly decided to remove the internees to Japan as though they were alien enemies. Congress had not been informed that the statute was to be utilized by him as an instrument to accomplish any such removal and never has expressed approval of any such removal action. It had been informed that the sole purpose was to provide for the detention of American citizens not charged with crime without doing violence to the Constitution. See R. 160 in No. 12251. At most, therefore, the statute may be construed, by implication, to extend congressional authority to the Attorney General to intern the already detained persons but it certainly cannot be construed to authorize their removal to Japan. The Joint Resolution of July 25, 1947, which rendered the statute inoperative was equivalent to a Congressional declaration that it no longer was desirable to detain any such restrained person. This Court's opinion indicates it failed to give this matter consideration.

V.

THIS COURT FAILED TO CONSIDER AND PASS ON THE CONTENTIONS THAT THE RENUNCIATIONS WERE ILLEGAL FOR BEING (1) THE PRODUCTS OF AN UNCONSTITUTIONAL DETENTION, (2) THE PRODUCTS OF WRONGDOING BY THE GOVERNMENT, AND (3) THEY WERE OBTAINED BY COERCION, AND (4) THEY WERE THE PRODUCTS OF INDUCEMENT.

These questions which this Court failed to consider and pass on are set forth in appellees' petition for a rehearing in the companion equity appeals, Nos. 12251 and 12252, and are incorporated herein by this reference.

 VI.

PETITIONERS' MOTIONS FOR JUDGMENT ON THE PLEADINGS PROPERLY WERE GRANTED BY TRIAL COURT.

In paragraph II of the amended petitions for writ of habeas corpus (R. 100) the petitioners alleged:

“Each petitioner is a person of Japanese ancestry and at all times herein mentioned has been and is domiciled in the United States and has been and is a resident of the northern district of California therein; each is a native-born American citizen and national of the United States and subject to the jurisdiction thereof; * * *”

In paragraph II of the respondents' amended returns (R. 134-5) to the amended petitions for writ of habeas corpus, the respondents make the following admission, in answer to the allegations of paragraph II of the amended petitions for the writ (R. 100):

“Respondents admit that each petitioner is a person of Japanese ancestry, a native, domiciliary of the United States, and a resident of the Northern District of California.”

It also contains an assertion, as follows:

“Respondents assert that each Petitioner is an alien and a citizen and subject of Japan, * * *”

The petitioners moved for judgment on the pleadings that the writ of habeas corpus issue and the petitioners be discharged from custody. (See R. 156.) No opposition thereto was filed by the respondents. No cross motions for judgment on the pleadings were filed by the respondents. The sole question then tendered by the pleadings was whether or not the interned petitioners were subject to internment and removal under the provisions of the Alien Enemy Act. This involved nothing but a question of law.

The respondents' *admission* that each petitioner is a native, domiciliary and resident of the United States controls the respondents' *assertion* that each was an alien, citizen and subject of Japan and completely negatives that assertion. The admission left nothing to be decided by the Court except the question of law whether they were subject to detention and removal under that Act. In addition to that admission there was proof that each petitioner was a citizen.

The fact that a person is born in the United States and is a resident carries with it the inference that he is a citizen. In the absence of proof to the contrary a person

is presumed to be a citizen of the country where he resides. Citizenship once shown to exist is presumed to continue. See 14 C.J.S. 1150, Sec. 18 and cases there cited. Inasmuch as the U.S. citizenship of each petitioner not only was admitted by the respondents' pleading but was proved and no contrary evidence was offered by the respondents none of the petitioners were subject to the provisions of the Alien Enemy Act. In consequence no issue other than the question of law whether petitioners were subject to internment and removal to Japan under the provisions of the Alien Enemy Act was presented and tendered by the pleadings for decision. The trial Court had no alternative except to grant the petitioners' motions for judgment on the pleadings that the writ of habeas corpus issue commanding production of petitioners in Court there to be discharged from custody without hearing being required. (R. 156.) The motions were resolved in the Court orders granting applications for writ of habeas corpus. (R. 175.) The petitioners' motions for judgment on the pleadings specifically were granted in the order denying respondent's motions and granting petitioners' motions and releasing petitioners from respondent's custody and awarding writ of habeas corpus and ordering its issuance. See R. 191 and 192 for specific mention that said motions were granted. Thereupon the writs issued. (R. 194.)

This Court's opinion completely overlooks the significance of the foregoing—it makes no mention of it and leaves this important matter unanswered.

VII.

**PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT
PROPERLY WERE GRANTED BY TRIAL COURT.**

On October 14, 1946, petitioners filed their "Motions for Summary Judgment That Writ of Habeas Corpus Be Awarded and Issue Commanding Production of Petitioners in Court There to Be Discharged From Custody Without Hearing Being Required." (R. 154.) Affidavits of merit were filed in support thereof, as specified in the motion at R. 155. The affidavits are the particular pleadings and personal affidavits specified at R. 162-164 and printed in the Transcript of Record in companion proceeding on appeal No. 12251.

On November 12, 1946, the respondents filed "Respondents' Points and Authorities in Opposition to Complainants' Motions for Summary Judgment and Cross Motions for Summary Judgment." See R. 161 for part thereof which refers to the cross motions, the remainder, consisting of points, authorities and argument, being deleted from the printed record. (No like cross motions or opposition, however, were filed by the respondents to the petitioners' motions (R. 156) for judgment on the pleadings.) In support thereof they filed, as parts thereof, the affidavits of Burling, Rothstein, Collins, Shevlin and Scott and the affidavit of Thomas M. Cooley, II, to which was attached the unverified documents, Exh. A (memorandum by Kenzo Takayanagi) and Exh. B (prepared by an undisclosed person of the Library of Congress), purportedly relating to Japanese nationality laws. On December 18, 1946, petitioners filed their objections thereto and moved

to strike those two exhibits along with other matter therein. (See R. 164.)

In this Court's opinion the following reference to those exhibits appears:

“Here an attempt was made by the respondents to show that the law of Japan created a dual citizenship by offering in evidence two unverified statements of Japanese statutes.”

This Court's opinion states that petitioners' motions to strike those exhibits on the ground of hearsay should have been granted and that the exhibits did not constitute the best evidence of Japanese statutes. What we desire to point out is that if stricken out they would be entitled to no weight on determining the motions and would have presented no issue. Inasmuch as the trial Court took the motion under submission, subject to the objections and exceptions thereto and the motion to strike the same, it was competent not only to rule on those motions but also to determine what evidentiary weight, if any, might be given to those exhibits. The trial judge was aware of the inadmissibility of those exhibits and also of the fact that no evidentiary weight was to attach to them. His order granting applications for writ of habeas corpus (R. 175) and his memorandum decision denying respondents' motions to vacate order granting applications for writ of habeas corpus (R. 182 and reported in 76 F.S. 664) and his opinion in the companion equity appeal (R. 410 in equity appeal No. 12251, reported in 77 F.S. 806) make this abundantly clear.

We also point out that the respondents and their counsel were aware that those two exhibits were inadmissible and that they were not entitled to evidentiary weight. They had ample opportunity to introduce properly authenticated evidence concerning Japanese nationality laws as well as to make offers of proof thereon or to enter into stipulations relating thereto but they did not do so and never expressed any desire or intention of so doing. They were content to submit the cause on the merits of their motions for summary judgment along with the petitioners' like motions, confident that the trial Court would decide either for or against them and thus dispose of the case in its entirety.

Inasmuch as the respondents did not attempt to introduce competent evidence concerning Japanese nationality laws but were content to have the cause decided on the merits as submitted on the respective motions for summary judgment it ill becomes this Court to reverse judgment simply to enable them to do so at this late date or to order or suggest that they do so. This seems to us to be no concern of the Court. It was a concern of the respondents and they, by intentionally submitting the cause for determination on the merits of their motions, waived their right so to do and to have the orders awarding the writ and discharging the petitioners from custody re-opened. In effect, this Court's Opinion seeks to inject into the cases evidence the respondents did not introduce and never even offered and had no intention of offering.

If the trial Court's decision had been against the petitioners for a failure to introduce or offer evidence we doubt that this Court would have reversed judgment just

to enable them to cure the deficiency. We submit that it is not the function of a Court, trial or appellate, to instruct the respondents or any party litigant what evidence they should or must produce. That is a matter for the parties litigant and their counsel to determine. If either side wishes to submit a case knowing that certain proffered evidence is inadmissible or not entitled to any evidentiary weight or without submitting evidence it is entitled so to do without suggestion or interference by the Court. When an Appellate Court reverses a judgment with directions or suggestions to a party litigant or counsel to fetch admissible evidence on an issue it intrudes beyond the judicial sphere and invades the domain reserved to counsel and the parties they represent.

This Court's opinion indulges in speculation concerning the nature of Japanese nationality laws and possible effect they might have on American citizens and residents under various circumstances. While it states it "expresses no opinion on any of these situations" it, nevertheless, leaves little doubt as to what its decision would be were such situations to arise. However, Japanese law in nowise was involved in the cases and could have presented no issue of fact or law affecting any of the petitioners for the reasons that follow:

Assuming *arguendo* that before renunciation an interned petitioner had sought Japanese citizenship. The mere seeking of a foreign citizenship would not constitute a forfeiture of American citizenship and would not confer foreign citizenship. The only methods of losing U.S. nationality are those formal ones specified in Title 8 USCA. See, Sec. 801. None of these specify that the

seeking or solicitation of foreign citizenship costs U.S. citizenship. Assume that a resident citizen renounced and thereafter claimed foreign citizenship. A mere claim would not confer foreign citizenship upon him. If any of the congressionally prescribed methods of surrendering nationality within the United States are taken voluntarily by a person there can be no acquisition of a foreign citizenship unless he thereafter leaves the United States and enters into the territorial jurisdiction of the foreign country where its laws are operative and there completes his expatriation by giving allegiance to the foreign government and acquiring its nationality. See *Savorgnan v. U. S.*, 338 U.S. 491, 502.

Our native born are citizens under the 14th Amendment and, as such, by law have a single allegiance to our government. Any law of Japan which might assert that American born children of resident Japanese parents are subjects of Japan and owe it allegiance could not possibly have any extraterritorial effect. See Title 8 USCA, Sec. 800, where Congress expressly rejects any claim that American citizens are "subjects of foreign states, owing allegiance to the governments thereof". That disavowal completely disposes of any contention that any resident American born citizen can possess dual nationality. As a matter of law, therefore, no petitioner as at the time of renunciation or thereafter had or could acquire dual nationality.

As a matter of law, also, no petitioner prior to renunciation could have had Japanese citizenship and none since then could have acquired it. If peace had formally been declared a renunciant liberated from internment

thereafter might have been enabled to acquire Japanese nationality under Title 8 USCA, Sec. 801 (b) by taking an oath or making an affirmation or other formal declaration of allegiance to Japan. However, this avenue was barred during the period of hostilities and has been closed ever since then for want of a Japanese diplomatic officer authorized by Japan to administer the same because all diplomatic relations were severed. It was also closed by the common law rule forbidding expatriation during wartime, as pointed out on page 38 of appellees' brief. It is conceivable, that except for that rule, a renunciant liberated from internment thereafter might have been enabled to acquire Japanese nationality but, in order so to do, he first would have to become an expatriate from the United States, that is to say, he would have to leave this country and enter the territorial jurisdiction of Japan. Until he did so Japan could acquire no jurisdiction over him for its laws have no extraterritorial effect. Its laws could have no extraterritorial application especially during the existence of the state of declared war which has existed from December 7, 1941, to this date and may continue for an indefinite period of time. Once in Japan he would have to comply with the Japanese nationality laws to acquire Japanese citizenship. The laws of Japan, however, have no extraterritorial effect. A right to naturalize persons physically within the jurisdiction of the United States could be conferred upon Japan only by a treaty provision entered into by the United States. This country never has conferred upon Japan, by treaty provision or otherwise, a right to naturalize any person within our jurisdiction. In consequence, as a matter of law none

of the resident petitioners, all of whom were in detention at the time of renunciation and in technical custody in this country since could have acquired Japanese nationality. It was and is legally impossible.

This Court's Opinion overlooked the point that Japan's laws have no extraterritorial effect, especially during the existence of the state of declared war. It also overlooked the fact that no treaty provision confers upon Japan the right to naturalize residents physically within the boundaries of the United States. It overlooked the fact that from the advent of the war to date no Japanese officer authorized to administer Japanese naturalization oaths has been present in this country for such a purpose by reason of the rupture of diplomatic relations. It overlooked the fact that it was a legal impossibility under our own law for any petitioner to acquire Japanese nationality. It gave these important matters no consideration.

VIII.

HABEAS CORPUS APPEALS ARE MOOT AS TO ALL BUT 138 APPELLEES.

There are 302 renunciants against whom removal orders still appear to be outstanding. See list of their names attached to defendants' petition filed in this Court to substitute a successor defendant, filed about November 8, 1949. Of those named therein, 136 are appellees in habeas corpus appeal No. 12195 when 2 are appellees in habeas corpus appeal No. 12196. The remaining 164 never were parties to the habeas corpus proceedings. However, all

of the 302, in due course, became parties to the equity suits, appeals Nos. 12251 and 12252. The 138 in the habeas corpus cases were *released* to their counsel and the 164 were *paroled* to him a few days prior to the execution of the formal Consent that appears on pages 196-7 of the Record in No. 12195. In consequence, the habeas corpus appeals are moot as to all the appellees save the 138 against whom removal orders still are outstanding.

CONCLUSION.

For the foregoing reasons said appellees urge this Court to withdraw its Opinion herein, to set aside its orders reversing the judgments of the District Court below as to them and remanding the causes to that Court, to grant them a rehearing on the serious issues involved herein and thereupon affirm the judgments of the Court below.

Dated, San Francisco, California,
February 16, 1951.

Respectfully submitted,

WAYNE M. COLLINS,

*Attorney for Appellees
and Petitioners.*

CERTIFICATE OF COUNSEL.

The within petition for a rehearing is well rounded in point of law and fact and is not interposed for delay.

Dated, San Francisco, California,
February 16, 1951.

WAYNE M. COLLINS,
*Attorney for Appellees
and Petitioners.*

